Supreme Court, U.S.
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ALEXANDER L. STEVAS,
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82-732

No. ____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

REUBEN STURMAN, JOSEPH ZERNIC,

Petitioners,

—vs—

UNITED STATES OF AMERICA,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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QUESTION PRESENTED FOR REVIEW

Whether, pursuant to the teaching of Abney v. United States, 431 U.S. 651 (1971), an evidentiary hearing must be held upon a defendant's motion to dismiss an indictment on grounds of double jeopardy?

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IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1982

No. _____

REUBEN STURMAN,
JOSEPH ZERNIC,
Petitioners,

-vs-

UNITED STATES OF AMERICA,
Respondent.

On Writ of Certiorari to the
United States Court of Appeals
for the Eleventh Circuit

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

Reuben Sturman and Joseph Zernic, petitioners, pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Eleventh Circuit.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eleventh Circuit appears at 679 F. 2d 840, and is set forth in the

separately bound Appendix at A3 - A21. The unreported opinion of the United States District Court for the Southern District of Florida is set forth in the Appendix at A22-A26.

JURISDICTION

The opinion and judgment of the United States Court of Appeals for the Eleventh Circuit were filed on June 28, 1982. The Court of Appeals denied the petitioners' application for rehearing on August 27, 1982. This petition seeks review of the judgment of a United States Court of Appeals in a criminal case. This Court has jurisdiction to grant this petition under 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment to the Constitution of the United States is set forth in the Appendix at A191. Title 18, Sections 2, 371, 1461, 1462 and 1465 are set forth in the Appendix at A192-A201.

STATEMENT OF THE CASE

This petition seeks review of the judgment entered by the United States Court of Appeals for the Eleventh Circuit which affirmed the order of the United States District Court for the Southern District of Florida denying petitioners an evidentiary hearing on a motion for dismissal of a conspiracy count in an indictment because of double jeopardy.

On February 11, 1980, an indictment was returned against petitioners, along with forty-three other named defendants, charging them with participation in a nationwide conspiracy to transport obscene materials in interstate commerce. In response to this indictment, petitioner Reuben Sturman, joined by petitioner Joseph Zernic, filed a motion to dismiss the conspiracy charge, on the ground that the previous acquittal on a charge of conspiracy to violate 18 U.S.C. §§1461, 1462 and 1465 under an indictment filed and tried in the Northern District of Ohio, Eastern Division

(Case No. CR76-124, App. at A153-A190) required dismissal pursuant to the Fifth Amendment protections against double jeopardy. In conjunction with their motions, petitioners requested an evidentiary hearing. Subsequently, on October 16, 1980, a grand jury in the Southern District of Florida issued sixteen indictments superseding the original indictment that petitioners had challenged. The superseding indictments separated the forty-five defendants into sixteen groups based upon geographic location and added charges under 18 U.S.C. §1462 to the conspiracy count, together with three parallel substantive counts. Moreover, in the superseding indictment filed against petitioners, the government changed the date on which the conspiracy allegedly commenced from July 1, 1977 charged in the original indictment, to December 1, 1977.

A comparison of the Florida prosecution with the prior prosecutions for alleged

conspiracies in Pennsylvania and Ohio reveals that all three were in reality parts of a single conspiracy. The Ohio conspiracy charge encompassed the time period beginning in September of 1973 and continuing until March 15, 1976 (App. at A153). The Pennsylvania conspiracy, which a Pennsylvania district court found to be part and parcel of the Ohio conspiracy, allegedly was conducted from January 1, 1974 through July 18, 1977 (App. at A123). Significantly, the original Florida indictment set forth the dates of that "nationwide" conspiracy as being from July 1, 1977 through February 11, 1980 (App. at A42), thus overlapping with the time period charged in the Pennsylvania indictment. It was only after petitioners challenged the indictment on double jeopardy grounds that the government issued a superseding indictment which removed the overlapping dates and

substituted a date creating a six-month hiatus (App. at A27).

Similarly, the conspirators alleged in Ohio and in Florida overlapped substantially in identity. Three of the four indicted Florida conspirators were charged or identified as conspirators in Ohio. Petitioners Sturman and Zernic were charged as conspirators in Ohio. Al Bloom, a defendant in the Florida prosecution, was identified as an unindicted conspirator in the Cleveland trial. Although Sovereign News, a defendant in the Ohio prosecution, was not named in the Florida indictment, the superseding indictment referred to an unnamed business as the vehicle by which the conspiracy was conducted (App. at A30, A125, A156).[1/]

Moreover, the statutory offenses were virtually identical, as was the nature

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1/ Numerous search warrant affidavits and discovery documents identify this unnamed corporation as Sovereign News.

and scope of the conspiracy. At trial in the Ohio prosecution, the government attempted to prove a nationwide conspiracy, see, United States v. Kamins, 479 F. Supp. 1374, 1386-1388 (W.D. Pa. 1979), while the original Florida indictment also charged the petitioners as participants in a nationwide conspiracy (App. at A44). Further comparison of the respective alleged conspiracies shows that each referred to the same supervisory personnel (App. at A30, A125), the same day-to-day participants (App. at A30, A156), and the same point of origin for the overt acts (App. at A31-A33, A156-A160).

After issuance of the superseding indictments, petitioners renewed their challenge to the indictment on double jeopardy grounds. In their motions, they clearly set forth the overlap in the

Florida and Ohio indictments. The documents attached to petitioners' motions, which included the Ohio indictment and subsequent acquittal, the Pennsylvania indictment and the opinion dismissing that indictment (United States v. Kamins, 479 F. Supp. 1374 (W.D. Pa. 1979), demonstrated that the charges, method, operation and scope of the conspiracies were identical and that their time periods overlapped.[2/] Petitioners subsequently filed a complete transcript of the trial on the Ohio indictment to substantiate directly the uncontested findings of the

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2/ Because the government, by artful drafting, can carve separate conspiracies from a single conspiracy, the courts have applied a different standard in determining the validity of double jeopardy claims involving conspiracies than used in analyzing substantive offenses. Rather than use the "same evidence" test, courts have focused their inquiry on whether the totality of circumstances demonstrates that the two alleged conspiracies are, in reality, part of a single conspiracy. See, United States v. Mallah, 503 F. 2d 971 (2nd Cir. 1974), cert. denied, 420 U.S. 995 (1975); United States v. Tercero, 582 F. 2d 312 (8th Cir. 1978).

district court in Kamins and the assertions made in petitioners' motions.

Petitioners incorporated as part of their motion the decision in United States v. Kamins, 479 F. Supp. 1374 (W.D. Pa. 1979). In Kamins, the Pennsylvania district court thoroughly analyzed and compared the Ohio and Pennsylvania conspiracies charged by the government. The court ultimately determined that the alleged Ohio conspiracy subsumed the conspiracy charged in the subsequent indictment returned in Pennsylvania.[3/] Specifically, it found: "[I]t appears the government brought the entire beast into court during the first trial [in Ohio] and now attempts to dismember it." Id., at 1390. Petitioners presented the

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3/ The United States did not appeal from this judgment and therefore is now collaterally estopped from challenging the district court's findings. Ashe v. Swenson, 397 U.S. 436 (1970). Rather, the determination that the Ohio indictment conspiracy subsumed the Pennsylvania conspiracy must be accepted as established fact.

Pennsylvania district court's finding that the Ohio conspiracy subsumed the conspiracy charged in the Pennsylvania indictment, one which possessed overlapping dates with that of the Florida conspiracy, as substantiation for their argument that the conspiracy charged in the Florida indictment was also a part of the nationwide conspiracy charged in the prior Ohio indictment.[4/] Following the

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[4/] The court below failed to recognize the significance of petitioners' argument that because the unappealed decision of the Pennsylvania court found that the Ohio conspiracy subsumed the Pennsylvania conspiracy, the dates and details of that conspiracy became relevant in evaluating petitioners' double jeopardy claim in the Florida prosecution. Instead, the courts below misinterpreted petitioners' argument as relying on the Pennsylvania prosecution as one in which jeopardy attached. As evidence of its confusion, the Court of Appeals commented: "Appellants seek to paper over the twenty month gap by injecting the dismissed Pennsylvania indictment and the original Florida indictment into our examination. This argument cannot succeed, however, for the simple reason that appellants were not placed in jeopardy under the dismissed Pennsylvania indictment." Id., at 844; App. at A14-A15.

reasoning of the Pennsylvania court, petitioners asserted that the government was simply attempting to circumvent petitioners' Fifth Amendment protections by cosmetically manipulating the allegations of the indictment.

Despite the importance of the issue raised by petitioners in their motion to dismiss, See, Abney v. United States, 431 U.S. 651 (1971), the Florida district court denied petitioners' request for an evidentiary hearing. Concluding, without an evidentiary hearing, that the motions were based on frivolous grounds, the court also denied the motions to dismiss. Notices of appeal from this order were timely filed with the district court.

The issues presented to the Court of Appeals were twofold: First, petitioners argued that the district court erred in failing to hold an evidentiary hearing on the double jeopardy issues raised by

petitioners, and secondly, they argued that on the record presented, the petitioners proved their claims of double jeopardy.

Over the strong dissent of Judge Hatchett, the Court of Appeals affirmed the order of the district court. With respect to petitioners' claim that the district court erred in failing to hold an evidentiary hearing, the court stated:

> Absent a proffer of evidence demonstrating a non-frivolous double jeopardy claim there is no obligation to hold an evidentiary hearing pursuant to Stricklin [591 F. 2d 1112 (5th Cir. 1979)]. In this case, appellants have failed to tender the requisite prima facie claim and the district court properly ruled on the motion on the basis of the extensive papers before it.

Id., at 844; App. at A18. The court upheld the district court's ruling on the double jeopardy motion despite the absence of any evidentiary hearing, contrary to the rule established in United States v. Stricklin, 591 F. 2d 1112, 1117 (5th Cir.) cert. denied, 444 U.S. 963, 100 S.Ct. 449,

62 L.Ed. 2d 375 (1979),[5] even though Stricklin ostensibly was regarded by the majority as precedent in the Eleventh Circuit.

In dissent, Judge Hatchett explained the gravity of the majority's error. He noted:

> The district court in the instant case erred in neglecting to conduct a pretrial evidentiary proceeding in which a record could have been made to test the double jeopardy claim. Since a question exists of factual manipulation by the government in defining the conspiracy charge, the failure to conduct the hearing is critical.

Id., at 485; App. at A20 (Emphasis added). On that basis, Judge Hatchett stated that he would "reverse and remand with instructions to conduct the requisite evidentiary hearing, which also would clarify [the factual] questions." Id., App. at A21.

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[5] The Stricklin court adopted the rule announced by the Third Circuit in United States v. Inmon, 568 F. 2d 320 (3rd Cir. 1977).

Because of the important questions raised by the court below regarding the proper procedure for evaluating a double jeopardy challenge, petitioners now seek review by this Court of the decision rendered by the Court of Appeals for the Eleventh Circuit.

REASONS FOR GRANTING THE WRIT

AN IMPORTANT QUESTION IS PRESENTED, UPON WHICH THERE IS CONFLICT AMONG FEDERAL COURTS OF APPEAL, CONCERNING WHETHER, PURSUANT TO THE TEACHING OF ABNEY V. UNITED STATES, 431 U.S. 651 (1971), AN EVIDENTIARY HEARING MUST BE HELD UPON A DEFENDANT'S MOTION TO DISMISS AN INDICTMENT ON GROUNDS OF DOUBLE JEOPARDY.

In effectuating the Fifth Amendment's protection against being "twice put in jeopardy of life or limb" for the same offense, this Court has held that pretrial orders denying claims of double jeopardy are immediately appealable as final orders. Abney v. United States, 431 U.S. 651, 662 (1977). In Abney, this

Court explained that the amendment's protections against the risk of conviction "would be lost if the accused were forced to 'run the gauntlet' a second time before an appeal could be taken." Id. Further, this Court stated:

> [I]f a criminal is to avoid exposure to double jeopardy and thereby enjoy the full protection of the Clause, his double jeopardy challenge to the indictment must be reviewable before that subsequent exposure occurs.

Id. (Emphasis in original). Thus, this Court found that the Double Jeopardy Clause of the Fifth Amendment was of such fundamental importance that an immediate appeal was required when double jeopardy protections were in any sense threatened.

The right to an interlocutory appeal means little, however, without procedures established to effectuate a meaningful appeal. Therefore, the issue that petitioners now raise, whether a prima facie showing of a double jeopardy claim must

be made before a defendant is entitled to an evidentiary hearing or whether a defendant is entitled to an evidentiary hearing to make his or her prima facie showing, is of critical importance. Its resolution lies at the heart of the Abney decision. The answer to this question determines whether a defendant will be guaranteed an appeal merely in form or an appeal in substance.

Lower courts have grappled with the problem of fashioning procedures affording full Fifth Amendment protection by facilitating appeals from pretrial orders denying claims of double jeopardy. In one of the first cases following this Court's ruling in Abney in which a pretrial double jeopardy challenge was made, the Court of Appeals for the Third Circuit construed Abney to find that certain procedural rules were necessary to effect a double jeopardy

challenge and to present an appealable double jeopardy claim. United States v. Inmon, 568 F. 2d 326 (3rd Cir. 1977). In Inmon, the court explained:

> As necessary consequences, the Abney-DiSilvio rule requires (1) that there must be a pre-trial proceeding in which an appropriate record may be made to test a double jeopardy claim; (2) that there must be rules about going forward with proof, burden of persuasion, and weight of the evidence; and (3) that the procedure must take account of other constitutional rights, such as the privilege against self-incrimination.

Id., at 329 (Emphasis added). The court found that one of the procedures critical to a challenge to an indictment on double jeopardy grounds was a pretrial proceeding at which evidence could be presented to resolve factual disputes and at which an adequate record could be developed for appellate review.

Subsequent to the Inmon decision, the Court of Appeals for the Fifth Circuit

was similarly confronted with an appeal of a district court order denying a motion to dismiss on double jeopardy grounds. United States v. Stricklin, 591 F. 2d 1112 (5th Cir. 1979). The Fifth Circuit also noted the need "to establish procedural rules for an Abney pretrial double jeopardy hearing, so that requirements such as going forward with proof, burden of persuasion, and weight of the evidence are equitably assigned to and understood by the parties." Id., at 1117. To this end, the court adopted the procedural rules, including the requirement of a pretrial evidentiary proceeding, established by the Court of Appeals for the Third Circuit in Inmon. Accord, United States v. Jabara, 644 F. 2d 574 (6th Cir. 1981).

In Inmon, Stricklin, and Jabara, the courts made it clear that under Abney, an evidentiary hearing was absolutely

essential to a district court's determination of a double jeopardy challenge--so that an adequate record would exist for the purpose of appellate review. In evaluating proper evidentiary standards to be used in developing a record, the Third, Fifth and Sixth Circuits acknowledged that basic practical considerations could not be ignored. The fact that the government had superior access to proof and controlled the particularity with which the indictments were drafted was key in defining the evidentiary procedures and standards to be employed. Stricklin, 591 F. 2d at 1118; Inmon, 568 F. 2d at 332, Jabara, 644 F. 2d at 576. Accordingly, the courts determined that the defendant should be afforded the opportunity to establish factual substantiation of his or her double jeopardy claim in an evidentiary hearing.

In clear conflict with the procedure established in Stricklin, Inmon and Jabara, and with the teaching of Abney itself, the court of appeals below aligned itself with the rule of the First Circuit and Ninth Circuit, as stated in United States v. Booth, 673 F. 2d 27 (1st Cir.), cert. denied, 102 S.Ct. 2245 (1982) and United States v. Bendis, 681 F. 2d 561 (9th Cir. 1982) and refused the petitioners an opportunity to an evidentiary hearing to present their double jeopardy claim. Although purporting to follow Stricklin, the court of appeals below found that petitioners were obligated to present a "prima facie nonfrivolous double jeopardy claim" before they were entitled to an evidentiary hearing. In addition, the court found that the denial of an opportunity to an evidentiary hearing was not erroneous because petitioners had failed "to suggest...anything that

might have been accomplished by holding such a hearing." 679 F. 2d at 844, App. at A17. In making such determination, the court failed to recognize the danger of forcing the defendants to "run the gauntlet" that this Court cautioned against in Abney.

As pointed out by Judge Hatchett in his dissent, the majority opinion ignores the rationale behind the procedural rules announced in Inmon and adopted by Stricklin and Jabara. It is at the pretrial evidentiary hearing where petitioners must establish that they possess a nonfrivolous prima facie claim, not prior thereto. Inmon-Stricklin-Jabara never established as a prerequisite to an evidentiary hearing that a defendant would be required to present in his motion papers all of the evidence that proved or tended to prove the double jeopardy claim. To the contrary, the Fifth Circuit in Stricklin

noted that a defendant "might find it necessary to offer his own testimony at the pretrial hearing." Id., at 1118. Quite clearly, the Stricklin-Inmon-Jabara courts recognized that because of the government's control of the facts, a defendant must have a full opportunity to present evidence via witnesses by direct or cross-examination, and to argue inferences and conclusions to be drawn from that evidence, prior to the district court's determination of whether a prima facie nonfrivolous double jeopardy claim had been shown so as to shift the burden of persuasion to the government. It is with this well-reasoned procedure that the opinion of the court below is in conflict.

The rule adopted by the court below as well as the courts in Booth and Bendis seriously erodes the Fifth Amendment protections which Abney was designed to secure.

The requirement of establishing a prima facie showing of double jeopardy before a defendant is granted an evidentiary hearing erects an insurmountable barrier to the presentation of a double jeopardy challenge. The defendant is forced to establish the grounds of his or her claim without access to the very evidence which is needed to make such a showing--the testimony of the government witnesses who conducted the investigation and who fashioned the indictments.

Moreover, the rule presents a serious contradiction with the intent and spirit of Abney by denying the defendant meaningful appellate review. A reviewing court will be faced with a sketchy and incomplete record on which to determine whether a defendant's Fifth Amendment rights have been threatened. If a court of appeals then determines that no opinion can be rendered on the record and an evidentiary hearing is necessary, the case

will have to be remanded. Once the hearing is held and the district court once again rules on the double jeopardy challenge, the claim may very well wend its way back to the appellate court for review. Such a waste of scarce judicial resources cannot be justified.

In short, the rule followed by the court below and the Court of Appeals for the First and Ninth Circuits emasculates Abney by forcing a defendant to appeal on a record of mere accusation and conjecture. Not only is the defendant, under this rule, placed in a position in which it is impossible to demonstrate his double jeopardy claim, but also the reviewing court is forced into the undesirable position of evaluating a claim of constitutional violation on an undeveloped, incomplete record. Such a procedure removes the protections to the defendant against being "forced to 'run the gauntlet'" established under Abney and impairs the system of appellate review

itself. Indeed, this was the very result sought to be avoided by the courts in Stricklin, Inmon and Jabara.

CONCLUSION

For these reasons, petitioners come before this Court seeking review of the decision of the Court of Appeals for the Eleventh Circuit and request this Court to give guidance and instruction on the proper procedure for effectuating the immediate right of appeal of double jeopardy challenges as conferred by this Court's opinion in Abney v. United States, supra. Just as a defendant's rights against double jeopardy would be seriously undermined if an immediate appeal of the issue could not be taken, those same rights are similarly undermined when a defendant is not permitted adequate opportunity to present evidentiary support to the trial court for his

double jeopardy challenge and further forced to appeal without benefit of a complete record. Accordingly, petitioners respectfully request that this Court grant their petition for a writ of certiorari.

Respectfully submitted,

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APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 81-5133

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

versus

REUBEN STURMAN,
Defendant-Appellant.

* *

No. 81-5231

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

versus

JOE ZERNIC,
Defendant-Appellant.

- - - - - - - - - - - - -

Appeal from the United States District Court for the Southern District of Florida

- - - - - - - - - - - - -

ON PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC

(Opinion JUNE 28, 11 Cir., 1982, F.2d).

( )

Before VANCE, HATCHETT and ANDERSON,
Circuit Judges.

PER CURIAM:

(x) The Petition for Rehearing is DENIED and no member of this panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 26), the suggestion for Rehearing En Banc is DENIED.

( ) The Petition for Rehearing is DENIED and the Court having been polled at the request of one of the members of the Court and a majority of the Circuit Judges who are in regular active service not having voted in favor of it (Rule 35, Federal Rules of Appellate Procedure; Local Eleventh Circuit Rule 26), the suggestion for Rehearing En Banc is also DENIED.

( ) A member of the Court in active service having requested a poll on the reconsideration of this cause en banc, and a majority of the judges in active service not having voted in favor of it, rehearing en banc is DENIED.

ENTERED FOR THE COURT:

/s/ Robert S. Vance
United States Circuit Judge

UNITED STATES of America,

Plaintiff-Appellee,

v.

Reuben STURMAN, Defendant-Appellant.

UNITED STATES of America,

Plaintiff-Appellee,

v.

Joe ZERNIC, Defendant-Appellant.

Nos. 81-5133, 81-5231.

United States Court of Appeals,

Eleventh Circuit.

June 28, 1982.

Appeals from the United States District Court for the Southern District of Florida.

Before VANCE, HATCHETT and ANDERSON, Circuit Judges.

VANCE, Circuit Judge:

[1] Reuben Sturman and Joe Zernic appeal the district court's denial of their motion

to dismiss a conspiracy indictment on double jeopardy grounds.[1] We affirm.

On October 15, 1980, a federal grand jury for the southern district of Florida returned a six count superseding indictment charging Sturman, Zernic, and two named codefendants with violating federal obscenity laws. The first count charged that the four defendants had conspired with each other and with certain unnamed persons to transport obscene material in interstate commerce and to use common carriers to ship the material to the southern district of Florida, all in violation of

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[1] Although the district court's order denying the motion to dismiss the indictment on double jeopardy grounds is in fact an interlocutory order, it is treated as a final order for purposes of appellate jurisdiction. Abney v. United States, 431 U.S 651, 659-62, 97 S.Ct. 2034, 2040-41, 52 L.Ed.2d 651 (1977); United States v. Stricklin, 591 F.2d 1112, 1117, (5th Cir.), cert. denied, 444 U.S. 963, 100 S.Ct. 449, 62 L.Ed.2d 375 (1979). We therefore have jurisdiction over this appeal pursuant to 28 U.S.C. §1291.

18 U.S.C. §371.[2] The conspiracy was alleged to have run from December 1, 1977 to June 5, 1978. The remaining five counts of the indictment alleged various instances of the use of common carriers to transport obscene material or the transportation of such matter in interstate commerce, in violation of 18 U.S.C. §§2, 1462.[3]

Appellants contend that the double jeopardy clause of the fifth amendment[4] bars their prosecution under this indictment because they previously were charged with and placed

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[2] 18 U.S.C. § 371 provides in relevant part:

> If two or more persons conspire either to commit any offense against the United States ...and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.

[3] Appellants have conceded that they have never before been placed in jeopardy for these substantive counts, so the remaining five counts of the indictment are not relevant to this appeal.

[4] The fifth amendment provides in relevant part:

> nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb....

U.S. Const., amend. V.

on trial for the same alleged conspiracy. The prior proceedings upon which this double jeopardy claim is based began with appellants' indictment on March 15, 1976 in the northern district of Ohio. The Ohio indictment charged appellants and six named codefendants, including the Sovereign News Company, with conspiracy and twenty-eight counts of substantive violations of the federal obscenity laws.[5/] As charged in Count I of the indictment, the conspiracy to violate the obscenity laws centered on the shipment of obscene materials by mail and common carrier through interstate commerce from Sovereign News in Cleveland, Ohio to the Webster Book Store in Fort Worth, Texas. The conspiracy was alleged to have operated between September 1973 and March 15, 1976.

5/ The Ohio indictment charged defendants under 18 U.S.C. §§ 2, 371, 1461, 1462, 1465.

Although all counts of the Ohio indictment involved shipments to the Webster Book Store in Fort Worth, the government's evidence at trial was much broader. It tended to show widespread distribution of obscene materials including in particular transmission of such materials to Majestic News in Pittsburgh, Pennsylvania. No evidence was introduced, however, to show shipments of obscene matter or conspiracy to ship obscene matter to Miami. Appellants were acquitted of the Ohio charges in July 1978.

Appellant Sturman was subsequently indicted for the same statutory offenses by a grand jury in the western district of Pennsylvania. Sturman and five codefendants were alleged to have conspired to distribute and to have distributed obscene materials under the aegis of the Sovereign News Company.[6/] Sovereign News and the defendants

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6/ The Pennsylvania indictment charged defendants with violating 18 U.S.C. §§ 371, 1465.

allegedly conspired with the Pittsburgh based Majestic News Company to distribute obscene materials in Pennsylvania, Ohio, West Virginia, New York, and elsewhere, while the substantive offenses charged involved shipments to various points in West Virginia. On motion of Sturman and one other defendant the conspiracy count of the Pennsylvania indictment was dismissed on double jeopardy grounds because of the substantial overlap between the charged conspiracy and the proof made in the earlier Ohio trial. United States v. Kamins, 479 F.Supp. 1374 (W.D. Pa. 1979).

The original Florida indictment was returned on February 11, 1980. Count I charged appellants and forty-three codefendants with conspiring between July 1, 1977 and the date of the indictment to transport obscene materials in interstate commerce. The predicate overt acts alleged were shipments of obscene material to Miami,

Florida from San Francisco and Los Angeles, California, as well as from Cleveland, Ohio. Count 5 of the indictment further charged appellants and two codefendants with various specific shipments of obscene material to Miami between December 6, 1977 and June 2, 1978. This original Florida indictment was dismissed on the government's motion on August 18, 1981. The grand jury subsequently charged the various defendants in sixteen separate indictments, one of which is the basis of this appeal.

Appellants moved to dismiss the conspiracy count of this indictment on double jeopardy grounds. They alleged that the charged conspiracy was in reality part of the larger nationwide conspiracy that had been the basis of the prior Ohio and Pennsylvania indictments. The district court denied the motion without holding an evidentiary hearing, and stated:

> Upon examination of the facts alleged and evidence offered in the Ohio trial the Court finds that the present indictment deals with an entirely different set of facts and a completely distinct time frame. The present indictment is narrowly drawn to reach only a specific limited conspiracy to ship obscene material to Miami, Florida. Under no view of the facts could the defendant be said to be put twice in jeopardy for the same offense.

On appeal Sturman and Zernic raise two issues. They contend first that they produced compelling proof of a double jeopardy violation and that the district court erred in not dismissing the conspiracy count. They further contend that the district court erroneously failed to hold an evidentiary hearing on their motions.

[2,3] The double jeopardy clause of the fifth amendment guarantees that an individual will not be subjected to multiple prosecutions for the same offense. Ash v. Swenson, 397 U.S. 436, 450, 90 S.Ct. 1189, 1197, 25 L.Ed.2d 469 (1979) (Brennan, J., concurring). The traditional test for determining whether two indictments

charge the same offense is whether the same proof will sustain a conviction under both or whether one requires proof of facts not required by the other. United States v. Tammaro, 636 F.2d 100, 103 (5th Cir. 1981). A facial examination of appellants' claim demonstrates that it wholly fails to establish the same offense under this general test. The former fifth circuit has recognized, however, that "by the nature of the crime, the precise bounds of a single conspiracy seldom will be clear from the indictment alone." United States v. Marable, 578 F.2d 151, 153 (5th Cir. 1979). Accordingly, the court has required, in testing whether for double jeopardy purposes two conspiracies are in fact one, a more detailed examination of the record than normally occurs under the "same evidence" test. Id. The essence of this determination is, of course, whether there was more that one agreement to engage in unlawful activity. nited States v.

Stricklin, 591 F.2d 1112, 1125 (5th Cir.), cert. denied, 444 U.S. 963, 100 S.Ct. 449, 62 L.Ed.2d 375 (1979). See also Braverman v. United States, 317 U.S. 49, 53, 63 S.Ct. 99, 101, 87 L.Ed. 23 (1942) (agreement constitutes conspiracy, not number of overt acts in furtherance of the agreement). The Marable court identified five factors of predominant importance in determining whether there was one agreement or more:

> (1) time, (2) persons acting as coconspirators, (3) the statutory offenses charged in the indictments, (4) the overt acts charged by the government or any other description of the offense charged which indicates the nature and scope of the activity which the government sought to punish in each case, and (5) places where the events alleged as part of the conspiracy took place.

United States v. Marable, 578 F.2d at 154.

[4] Applying these factors to this case, it is apparent that the Florida indictment alleges a separate conspiracy that is not barred by the double jeopardy

clause. Only the third factor, identity of the statutory offenses charged, favors appellants. Both the Ohio indictment and the superseding Florida indictment charge violations of 18 U.S.C. § 371 in connection with violations of the federal obscenity laws.

The four remaining Marable factors, which are clearly more important to the double jeopardy analysis, point to the contrary conclusion that two distinct conspiracies were charged. The two indictments allege that the conspiratorial events occurred in separate places. The charges in the present indictment deal with specific shipments of pornographic material to Miami. Conversely, the Ohio indictment dealt with a pornography distribution ring of broad scale, but no evidence was introduced at the Ohio trial that even suggested a connection with Miami. Appellants concede

that the overt acts charged here are dissimilar from those charged in the prior indictment, so the fourth Marable factor counts against their claim.[7] Additionally, there was no identity of coconspirators in the two indictments. Of the seven individuals indicted in Ohio, only two, Sturman and Zernic, were indicted in any of the sixteen superseding Florida indictments. Appellants argue that one of the two remaining defendants in this superseding indictment was an unnamed coconspirator in Ohio, but we think that the identity of unindicted persons is inconsequential for this double jeopardy analysis.

[5] The most significant element of the Marable analysis under the present facts involves the dates of the two conspiracies. The alleged Ohio conspiracy only extended until March 15, 1976, while the conspiracy now charged is alleged to have begun on December 1, 1977. Appellants seek to paper

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[7] See supra note 3.

over the twenty month gap by injecting the dismissed Pennsylvania indictment and the original Florida indictment into our examination. This argument cannot succeed, however, for the simple reason that appellants were not placed in jeopardy under the dismissed Pennsylvania indictment. See Crist v. Bretz, 437 U.S. 28, 37-38, 98 S.Ct. 2156, 2161-62, 57 L.Ed.2d 24 (1978); United States v. Futch, 637 F.2d 386, 389 (5th Cir. 1981). That indictment, therefore, is immaterial to the narrow double jeopardy issue that is before us: whether appellants are currently charged with the same conspiracy of which they were acquitted in the prior Ohio prosecution.[8/]

[8/] Appellants also contend that the dismissal of the Pennsylvania indictment necessarily entailed the resolution of certain factual issues that should be binding upon the government according to principles of collateral estoppel. This court is without jurisdiction under 28 U.S.C. § 1291, however, to entertain this contention. United States v. Tammaro, 636 F.2d 100, 101 n.1 (5th Cir, 1981). See Abney v. United States, 431 U.S. 651, 662-663, 97 S.Ct. 2034, 2041-42, 52 L.Ed.2d 651 (1977).

We conclude that the application of the Marable test to this case points to the unmistakeable conclusion that the two conspiracies are separate and that the district court properly overruled the claim of double jeopardy. We note and expressly reject the argument implicit in appellants' contentions that once the government put on evidence at the prior trial showing an ongoing, open ended conspiracy of national scope, it would thereafter be barred from charging any future conspiracy. That would mean that following an acquittal such a defendant would be licensed to enter criminal conspiracies with impunity. Neither our authorities nor logic support such a suggestion in any way.[9/]

9/ Our result would be the same even if we were to construe the Florida conspiracy to be a continuation of the Ohio conspiracy. "Further operation of the 'old' conspiracy after being charged with that crime becomes a new offense for purposes of the double jeopardy claim." United States v. Stricklin, 591 F.2d 1112, 1121, n.2 (5th Cir.), cert. denied, 444 U.S. 963, 100 S.Ct. 449, 62 L.Ed.2d 375 (1979).

[6] Appellants argue alternatively that the district court should have held an evidentiary hearing before deciding their double jeopardy motion. They fail to suggest, however, anything that might have been accomplished by holding such a hearing. The district court had before it a complete transcript of the Ohio trial and a sufficient record of all other proceedings, so it is difficult to imagine what other relevant evidence could have been adduced at an evidentiary hearing. On this basis alone they have failed to demonstrate reversible error. More importantly, however, appellants have failed to meet their threshold burden:

> It is undisputed that the burden of going forward by putting the double jeopardy claim in issue is and should be on the defendant. It is similarly reasonable to require the defendant to tender a prima facie nonfrivolous double jeopardy claim before the possibility of a shift of the burden of persuasion to the government comes into play.

United States v. Stricklin, 591 F.2d at 1117-18. Absent a proffer of evidence demonstrating a nonfrivolous double jeopardy claim there is no obligation to hold an evidentiary hearing pursuant to Stricklin. In this case appellants have failed to tender the requisite prima facie claim and the district court properly ruled on the motion on the basis of the extensive papers before it.

AFFIRMED.

HATCHETT, Circuit Judge, dissenting:

I respectfully dissent. The majority opinion states that "[a]bsent a proffer of evidence demonstrating a nonfrivolous double jeopardy claim there is no obligation to hold an evidentiary hearing pursuant to Stricklin." In United States v. Stricklin, 591 F.2d 1112, 1117 (5th Cir.), cert. denied, 444 U.S. 963, 100 S.Ct. 449, 62 L.Ed.2d 375 (1979), the Fifth Circuit adopted the reasoning of United States v.

Inmon, 568 F.2d 326 (3rd Cir. 1977), in establishing procedural rules for a pretrial double jeopardy hearing with regard to evidentiary requirements such as the burdens of going forward and persuasion. In requiring the defendant to meet its burden of going forward by tendering a prima facie nonfrivolous double jeopardy claim, the Stricklin court assumed that the defendant would make this showing at the pretrial double jeopardy hearing. The court did not require that such a showing be made as a prerequisite to holding a hearing. Nor does Stricklin require, as the majority opinion posits, that the defendant state what "might [be] accomplished by holding such a hearing." On the contrary, the Inmon court stated that "there must be a pretrial proceeding in which an appropriate record may be made to test a double joepardy claim...." Inmon, 568 F.2d at 329 (emphasis added).

The district court in the instant case erred in neglecting to conduct a pretrial evidentiary proceeding in which a record could have been made to test the double jeopardy claim. Since a question exists of factual manipulation by the government in defining the conspiracy charged, the failure to conduct the hearing is critical. Similarly, the Stricklin court evinced a concern for this problem, as it stated:

> The government is clearly in a better position to show that the crime charged in the present indictment is not the same as the one charged in the previous indictment than the defendant is to show that the crimes are the same.... Since the government controls the particularity of an indictment, it should bear the responsibility for any ambiguities resulting in its vagueness that are left unresolved by a bill of particulars.

Stricklin, 591 F.2d at 1118-19.

I also disagree with the conclusion that, since appellants were not placed in jeopardy under the Pennsylvania indictment, that

indictment is irrelevant in determining whether appellants are currently charged with the same conspiracy of which they were acquitted in the prior Ohio prosecution. The finding that the Pennsylvania conspiracy was subsumed by the conspiracy charged in the earlier Ohio indictment compels the conclusion that the Ohio conspiracy continued through the time alleged in the Pennsylvania indictment.

I therefore would reverse and remand with instructions to conduct the requisite evidentiary hearing, which also would clarify these questions.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 80-56-Cr-EPS (S-10)

UNITED STATES OF AMERICA Plaintiff, v. REUBEN STURMAN, JOE ZERNIC, AL BLOOM, and STEVE "MARTIN" ASSID, Defendants.	ORDER DENYING MOTION TO DISMISS ON THE GROUND OF DOUBLE JEOPARDY

This cause has come before the Court on the defendants', Joe Zernic, Al Bloom, and Steve Assid, Motion to Dismiss the present indictment on the ground of double jeopardy, specifically adopting the motion filed by the defendant Reuben Sturman. The Court notes that the above referenced motion of the defendant Sturman was Denied by the Court on January 27, 1981. Since the other defendants have raised no other

basis for the motion for dismiss, the previous order of this Court expresses the Court's analysis of the factual and legal issues involved in the present motion to dismiss. For the reasons expressed in this Court's order of January 27, 1981, the present Motion to Dismiss on the ground of double jeopardy, filed by the defendants Zernic, Bloom and Assid, is DENIED. The Court renews its finding that this motion is frivolous and for that reason, the trial of this cause will not be stayed for purposes of appeal.

DONE AND ORDERED in Chambers at Miami, Florida this 26 day of February, 1981.

/s/Eugene P. Spellman
EUGENE P. SPELLMAN
UNITED STATES DISTRICT COURT

Copies to: all parties

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 80-56-Cr-EPS (S-10)

UNITED STATES OF AMERICA, Plaintiff, v. REUBEN STURMAN, et al, Defendants.	ORDER DENYING MOTION TO DISMISS ON THE GROUND OF DOUBLE JEOPARDY

This cause is before the Court on the defendant Reuben Sturman's Motion to Dismiss the present indictment on the ground of double jeopardy. The defendant asserts that due to his acquittal on obscenity/conspiracy charges in the United States District Court, Northern District of Ohio, in July, 1978 and due tc dismissal of a subsequent indictment filed in 1978 in the United States District Court, Western District of Pennsylvania a double jeopardy situation exists with regard to the present indictment.

The Court first notes that the Pennsylvania indictment was dismissed before trial on the ground of double jeopardy. Thus, only the Ohio indictment, which was filed in 1976, and the subsequent trial of that case pose a potential 5th Amendment double jeopardy problem. The issue for the Court is whether the present indictment alleges the same offense as that tried in 1978 in Ohio.

The tests for evaluating double jeopardy claims have been outlined by the 5th Circuit in Hardwick v. Doolittle, 558 F.2d 292 (5th Cir. 1977), and United States v. Linnetsky, 533 F.2d 192, 197 (5th Cir. 1976). Upon examination of the facts alleged and evidence offered in the Ohio trial, the Court finds that the present indictment deals with an entirely different set of facts and a completely distinct time frame. The present indictment is narrowly drawn to reach only a specific limited conspiracy

to ship obscene material to Miami, Florida. Under no view of the facts could the defendant be said to be put twice in jeopardy for the same offense.

It is therefore ORDERED that the defendant's motion be and the same is hereby DENIED. Further, the Court finds that a stay of proceedings on the present indictment is not warranted by this motion, since the motion is based on frivolous grounds.

Simultaneously with the issuance of this order, the trial of this case has been continued in accordance with the motion of the defendant Reuben Sturman. The case is not presently on the trial calendar.

DONE AND ORDERED in Chambers at Miami, Florida this 27 day of January, 1981.

/s/Eugene P. Spellman
EUGENE P. SPELLMAN
UNITED STATES DISTRICT JUDGE

Copies to: Fred Schwartz
Arthur Schwartz
Bernard Berkman

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

UNITED STATES OF AMERICA,	:	
Plaintiff,	:	CASE NO. 80-56-Cr-EPS(S10)
v.	:	18 U.S.C. 2 18 U.S.C. 371
RUBIN STURMAN JOE ZERNIC AL BLOOM, and STEVE "MARTIN" ASSID:	:	18 U.S.C. 1462 18 U.S.C. 1465
Defendants.	:	

I N D I C T M E N T

THE GRAND JURY CHARGES THAT:

COUNT 1

1. From on or about December 1, 1977, and continuously thereafter up to and including February, 1980, in the Southern District of Florida and elsewhere, RUBIN STURMAN, JOE ZERNIC, AL BLOOM, and STEVE "MARTIN" ASSID, hereinafter referred to collectively as the defendants, knowingly combined, conspired, confederated, and

agreed together with each other and with others to the Grand Jury known and unknown, to commit offenses against the United States, that is:

a) To knowingly use an express company and common carrier for carriage in interstate commerce to transport to the Southern District of Florida obscene, lewd, lascivious, and filthy books, pamphlets, pictures, motion picture films, papers, letters, writings, prints, and other matter of indecent character to wit:

The following video tape cassettes of motion pictures:

Teenage Housewife

Rites of Uranus

The following eight millimeter films:

Mr. Footlong No. 3, from the Collection Series

#357 Hand Fucker, from the Karla Schmidt Series

No. 464 Alice's Baby, from the Karla Schmidt Series

No. 6 Black and White Suck, from the Creme De La Creme Series

The following magazines:

Playing Hooky, from the Connoisseur Series

Three in A Tub, from the Connoisseur Series

Pornoboy #12

in violation of Title 18, United States Code, Section 1462.

b) To knowingly transport in interstate commerce to the Southern District of Florida for the purpose of sale and distribution, obscene, lewd, lascivious, and filthy books, pamphlets, pictures, films, papers, letters, writings, prints, silhouettes, drawings, figures, images, casts, phonograph recordings, electrical transcriptions, and other articles capable of producing sound and other matters of indecent and immoral character, to wit: The aforementioned

video tape cassettes of motion pictures, films and magazines in Paragraph 1(a), of this Count which is incorporated herein and made a part hereof, in violation of Title 18, United States Code, Section 1465.

2. It was part of the conspiracy that the defendants would engage in a business which included the distribution of obscene video tape cassettes of motion pictures, films, and magazines in interstate commerce.

3. It was a further part of the conspiracy that the defendant RUBIN STURMAN would act in a supervisory capacity with regard to the activities of the defendants JOE ZERNIC, AL BLOOM, and STEVE "MARTIN" ASSID involving the distribution of video tape cassets of motion pictures, films, and magazines.

4. It was further part of the conspiracy that defendants JOE ZERNIC, AL BLOOM, and STEVE "MARTIN" ASSID would conduct the daily operations of the above-mentioned business.

OVERT ACTS

In furtherance of said conspiracy and to effect the objects thereof, in the Southern District of Florida, and elsewhere, one or more of the defendants committed and caused to be committed one or more of the following overt acts, among others.

1) On or about December 6, 1977, in Cleveland, Ohio, the defendants JOE ZERNIC and AL BLOOM, met with undercover Special Agents of the Federal Bureau of Investigation and arranged to ship films to Miami, Florida.

2) On or about and between December 1, 1977 and December 15, 1977, the defendants, RUBIN STURMAN, JOE ZERNIC, AL BLOOM, and STEVE "MARTIN" ASSID, caused to be shipped to Miami, Florida the following eight millimeter films:

a. Mr. Footlong No. 3, from the Collection Series

b. #357 Hand Fucker, from the Karla Schmidt Series

c. No. 464 Alice's Baby, from the Karla Schmidt Series

3) On or about February 1, 1978, in Cleveland, Ohio, the defendants, JOE ZERNIC and AL BLOOM, met with undercover Special Agents of the Federal Bureau of Investigation and arranged to ship films and magazines to Miami, Florida.

4) On or about and between February 27, 1978, and March 2, 1978, the defendants, JOE ZERNIC and STEVE "MARTIN" ASSID in Cleveland, Ohio, engaged in telephonic conversations with undercover Special Agents of the Federal Bureau of Investigation in Miami, Florida, and arranged to ship video tape cassettes of motion pictures in Miami, Florida.

5) On or about January 5, 1980, in Las Vegas, Nevada, the defendant, RUBIN STURMAN, discussed with undercover Special Agents of the Federal Bureau of Investigation

shipments of films and video tape cassettes which had been previously sent to Miami, Florida.

All in violation of Title 18, United States Code, Section 371.

THE GRAND JURY FURTHER CHARGES THAT:

COUNT 2

On or about and between December 1, 1977, and December 15, 1977, the defendants, RUBIN STURMAN, JOE ZERNIC, AL BLOOM, and STEVE "MARTIN" ASSID knowingly used an express company and common carrier for carriage in interstate commerce to transport to the Southern District of Florida, obscene, lewd, lascivious, and filthy books, pamphlets, pictures, motion picture films, writings, electrical transcriptions, and other matters of indecent character, to-wit: the following eight millimeter films:

Mr. Footlong No. 3, from the Collection Series

#357 Hand Fucker, from the Karla Schmidt Series

No. 464 Alice's Baby, from the Karla Schmidt Series

All in violation of Title 18, United States Code, Sections 1462 and 2.

THE GRAND JURY FURTHER CHARGES THAT:

COUNT 3

On or about and between December 1, 1977, and December 15, 1977, the defendants RUBIN STURMAN, JOE ZERNIC, AL BLOOM and STEVE "MARTIN" ASSID knowingly transported in interstate commerce to the Southern District of Florida for the purpose of sale and distribution, obscene, lewd, lascivious, and filthy pamphlets, pictures, films, papers, letters, books, writings, prints, silhouettes, drawings, figures, images, casts, phonograph recordings, electrical transcriptions, and other articles capable of producing sound and other matters of indecent and immoral character, to wit the following eight millimeter films:

Mr. Footlong No. 3, from the Collection Series

#357 Hand Fucker, from the Karla Schmidt Series

No. 464 Alice's Baby, from the Karla Schmidt Series

All in violation of Title 18, United States Code, Sections 1465 and 2.

THE GRAND JURY FURTHER CHARGES THAT:

COUNT 4

On or about and between February 1, 1978 and February 7, 1978, the defendants, RUBIN STURMAN, JOE ZERNIC, AL BLOOM, and STEVE "MARTIN" ASSID, knowingly used an express company and common carrier for carriage in interstate commerce to transport to the Southern District of Florida, obscene, lewd, lascivious, and filthy books, pamphlets, pictures, motion picture films, writings, electrical transcriptions, and other matters of indecent character,

to-wit:

The following eight millimeter films:

No. 6 Black and White Suck, from Creme De La Creme Series

The following magazines:

Playing Hooky, from the Connoisseur Series

Three in a Tub, from the Connoisseur Series

Pornoboy #12, from the Connoisseur Series

All in violation of Title 18, United States Code, Sections 1462 and 2.

THE GRAND JURY FURTHER CHARGES THAT:

COUNT 5

On or about and between February 1, 1978, and February 7, 1978, the defendants RUBIN STURMAN, JOE ZERNIC, AL BLOOM, and STEVE "MARTIN" ASSID knowingly transported in interstate commerce to the Southern District of Florida for the purpose of sale

and distribution, obscene, lewd, lascivious, and filthy pamphlets, pictures, films, papers, letters, writings, books, prints, silhouettes, drawings, figures, images, casts, phonograph recordings, electrical transcriptions, and other articles capable of producing sound and other matters of indecent and immoral character, to wit:

The following eight millimeter film:

No. 6 Black and White Suck, from the Creme De La Creme Series

The following magazines:

Playing Hooky, from the Connoisseur Series

Three in a Tub, from the Connoisseur Series

Pornoboy #12, from the Connoisseur Series

All in violation of Title 18, United States Code, Sections 1465 and 2.

THE GRAND JURY FURTHER CHARGES THAT:

COUNT 6

On or about and between March 1, 1978, and June 5, 1978, the defendants RUBIN STURMAN, JOE ZERNIC, AL BLOOM, and STEVE "MARTIN" ASSID knowingly used an express company and common carrier for carriage in interstate commerce to transport to the Southern District of Florida, obscene, lewd, lascivious, and filthy pamphlets, pictures, motion picture films, writings, books, electrical transcriptions, and other matters of indecent character, to wit:

The following video tape cassettes of motion pictures:

Teenage Housewife

Rites of Uranus

All in violation of Title 18, United States Code, Sections 1462 and 2.

THE GRAND JURY FURTHER CHARGES THAT:

COUNT 7

On or about and between March 1, 1978, and June 5, 1978, the defendants RUBIN STURMAN, JOE ZERNIC, AL BLOOM, and STEVE "MARTIN" ASSID knowingly transported in interstate commerce to the Southern District of Florida for the purpose of sale and distribution, obscene, lewd, lascivious, and filthy pamphlets, pictures, films, papers, letters, writings, prints, books, silhouettes, drawings, figures, images, casts, phonograph recordings, electrical transcriptions, and other matters of indecent and immoral character, to wit:

The following video tape cassettes of motion pictures:

Teenage Housewife

Rites of Uranus

All in violation of Title 18, United

States Code, Sections 1465 and 2.

A TRUE BILL

/s/ Harry Deiderich
FOREMAN

/s/Atlee W. Wampler III
ATLEE W. WAMPLER, III
UNITED STATES ATTORNEY
SOUTHERN DISTRICT OF FLORIDA

/s/ S. Michael Levin
S. MICHAEL LEVIN
ATTORNEY-IN-CHARGE
SOUTHEASTERN REGIONAL STRIKE FORCE
U.S. DEPARTMENT OF JUSTICE

/s/ Fred A. Schwartz
FRED A. SCHWARTZ
SPECIAL ATTORNEY
U.S. DEPARTMENT OF JUSTICE

/s/ Marcella Cohen
MARCELLA COHEN
SPECIAL ATTORNEY
U.S. DEPARTMENT OF JUSTICE

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

UNITED STATES OF AMERICA	:	
Plaintiff,	:	
v.	:	
ROBERT "DEBE" DI BERNARDO,	:	
THEODORE "TEDDY" ROTHSTEIN,	:	CRIMINAL CASE NO. 80-56-CR-EPS
ANDREW "ANDRE" D'APICE,	:	18 U.S.C. 371
LEO WEINTRAUB,		18 U.S.C. 1465
LOUIS "BUTCHIE" PERAINO,	:	18 U.S.C. 2
JOSEPH "JOE" PERAINO,	:	
MICHAEL BALSAMO,	:	
VINCE DI STEPHANO,		
ARNIE HIMMELSTEIN,	:	
KENNETH GUARINO,		
JOSEPH A. RENZI, JR.,	:	
ANTHONY "BUTCH" DI BONA,	:	
MICHAEL "MICKEY" ZAFFARANO,	:	
JOSEPH "JOE BLACK" ARIENO,	:	
LARRY MATHES,		
ROBERT "BOBBY" ZEICHICK,	:	
NOEL BLOOM,	:	
ROGER SUMMERS,		
JOE MALLEN,	:	
ROGER CHAN,		
LARRY NELSON,	:	
ROLAND BOUDREAULT,		
ANTHONY "TONY" DEFALCO,	:	
PAUL GORMAN,	:	
RUBIN STURMAN,		

JOE ZERNIC, :
WALTER "FRENCHY"
BAGNELL, :
LOUIS "LOU"
GUGLIELMI, :
AL BLOOM,
STEVE "MARTIN" :
ASSID,
THEODORE "TEDDY" :
GASWIRTH,
RUBY GOTTESMAN, :
AL TAPPER,
RAY HIND, :
HARRY MOHNEY,
JERRY WADE, :
PHILLIP CHARLES
"CHUCK" BERSTENE, :
NORMAN "NORM" ARNO,
MARTY BERNBACK, :
THOMAS SINOPOLI,
DONALD "SANDY" :
SARNBLAD,
TIMOTHY "TIM :
SIMPSON" BURNS,
BILL JACKMORE, :
TONY ARNONE, and
JOHN "J.B." "LA :
GRAND" BELMONT,
:
Defendants

I N D I C T M E N T

THE GRAND JURY CHARGES THAT:

COUNT 1

1. From on or about the first day of July, 1977, and continuously thereafter up to and including the date of this indictment, in the Southern District of

of Florida and elsewhere, ROBERT "DEBE" DI BERNARDO, THEODORE "TEDDY" ROTHSTEIN, ANDREW "ANDRE D'APICE, LEO WEINTRAUB, LOUIS "BUTCHIE" PERAINO, JOSEPH "JOE" PERAINO, MICHAEL BALSAMO, VINCE DI STEPHANO, ARNIE HIMMELSTEIN, KENNETH GUARINO, JOSEPH A. RENZI, JR., ANTHONY "BUTCH" DI BONA, MICHAEL "MICKEY" ZAFFARANO, JOSEPH "JOE BLACK" ARIENO, LARRY MATHES, ROBERT "BOBBY" ZEICHICK, NOEL BLOOM, ROGER SUMMERS, JOE MALLEN, ROGER CHAN, LARRY NELSON, ROLAND BOUDREAULT, ANTHONY "TONY" DEFALCO, PAUL GORMAN, WALTER "FRENCHY" BAGNELL, LOUIS "LOU" GUGLIELMI, RUBIN STURMAN, JOE ZERNIC, AL BLOOM, STEVE "MARTIN" ASSID, THEODORE "TEDDY" GASWIRTH, RUBY GOTTESMAN, AL TAPPER, RAY HIND, HARRY MOHNEY, JERRY WADE, PHILLIP CHARLES "CHUCK" BERNSTENE, NORMAN "NORM" ARNO, MARTY BERNBACK, THOMAS SINOPOLI, DONALD "SANDY" SARNBLAD, TIMOTHY "TIM SIMPSON" BURNS, BILL JACKMORE, TONY ARNONE and JOHN "J.B." "LA GRAND" BELMONT, hereinafter referred to collec-

tively as the Defendants, did knowingly and willfully combine, conspire, confederate, and agree together with each other and with others to the Grand Jury known and unknown, to commit offenses against the United States, that is to knowingly transport in interstate commerce for the purpose of sale and distribution any obscene, lewd, lascivious, and filthy book, pamphlet, picture, film, paper, letter, writing, print, image, electrical transcription, and other matter of indecent and immoral character, in violation of Title 18, United States Code, Section 1465.

2. It was the purpose of that conspiracy to facilitate the ownership, manufacture and wholesale distribution of obscene films, magazines and video tape cassettes throughout the obscenity industry in the United States of America.

3. It was a part of that conspiracy that the Defendants would promote the availability of illegal products among

obscenity owners, manufacturers, and wholesale distributors.

4. It was a further part of that conspiracy that the Defendants would prevent the infiltration of the obscenity industry by agents of and informants for law enforcement by communicating immediately to other members of the conspiracy knowledge of such infiltration and by establishing "watch lists" of suspected agents of and informants for law enforcement.

5. It was a further part of that conspiracy that the Defendants would facilitate the collection of debts within the obscenity industry by legal and illegal means including boycotts, threats of force and use of force.

6. It was a further part of that conspiracy that the Defendants would enforce the prohibition against unauthorized duplication of obscene films and motion

pictures which are owned, manufactured and wholesale distributed by members of the conspiracy through the use of boycotts, threats of force and force.

OVERT ACTS

In furtherance of said conspiracy and to effect the objects thereof, in the Southern District of Florida and elsewhere, one or more of the Defendants committed and caused to be committed one or more of the following overt acts, among others.

1. On September 7, 1977, in Los Angelos, California, the defendants AL TAPPER and RAY HIND did meet an undercover Special Agent of the Federal Bureau of Investigation and agreed to transport and cause to be transported in interstate commerce for sale and distribution from Los Angeles, California, to Miami, Florida, obscene, lewd, lascivous, and filthy films and magazines.

On or about September 30, 1977, in Miami, Florida, an undercover Special Agent of the Federal Bureau of Investigation did receive these items which included the following films:

Series	Films
a. Eruption	Tennis Balls
b. Lassie Braun America	Backside Fever
c. Orgy Erotica	The Tigress

and the following magazines:

a. Sweet Sexteen

b. Humping #2

c. Bleeding Pussy

2. On or about September 8, 1977, in Los Angeles, California, the defendant WALTER "FRENCHY" BAGNELL did meet with an undercover Special Agent of the Federal Bureau of Investigation and agreed to transport and cause to be transported in interstate commerce for sale and distribution to Miami, Florida, obscene, lewd, lascivious, and filthy films.

On or about September 12, 1977, in Miami, Florida, an undercover Special Agent of the Federal Bureau of Investigation did receive these items which included the following films:

Series	Films
a. Sexual World	#1 Poker Prick
b. Sexual World	#4 Hula Whore
c. Sexual World	#5 Fifty Dollar Fuck

3. On or about and between September 8, 1977, and September 19, 1977, after a meeting with undercover Special Agents of the Federal Bureau of Investigation in Los Angeles, California, the defendant TIMOTHY "TIM SIMPSON" BURNS, did knowingly transport and cause to be transported in interstate commerce for sale and distribution to Miami, Florida, obscene, lewd, lascivious, and filthy films and magazines including the following films and the following magazines:

a. Wet Dreams

b. Fifteen 15 No. 4

c. Spread Your Legs

d. Young and Tender

e. Pornoboy 11

f. Cumin

g. Marilyn Chambers Story in Hardcore (8 millimeter film)

4. On or about and between October 10, 1977 and October 12, 1977, the defendants ANTHONY "TONY" DEFALCO and WALTER "FRENCHY" BAGNELL did meet with each other and others in Chicago, Illinois.

5. On or about October 12, 1977, the defendant PAUL GORMAN did meet with an undercover Special Agent of the Federal Bureau of Investigation and did agree to transport and cause to be transported in interstate commerce for sale and distribution to Miami, Florida, obscene, lewd, lascivious, and filthy films and magazines.

On or about October 17, 1977, in Miami, Florida, an undercover Special Agent of

the Federal Bureau of Investigation did receive these items which included the following films:

Series	Films
a. Inger Brent	Little Big Man
b. Ball Buster	A4 - Horse Fucker
c. Ball Buster	A2 - Black Dog
d. Ball Buster	305

and the following magazines:

a. Cherry Love

b. Fuck Me Daddy

6. On or about November 1, 1977, the defendant RAY HIND did knowingly transport and cause to be transported in interstate commerce for sale and distribution to Miami, Florida, obscene, lewd, lascivious, and filthy films and magazines including the following films:

Series	Films
a. The Players	Chocolate and Vanilla
b. Screw	Anal Passions
c. Possessed	Wild Party Rape

and including the following magazines:

a. Fuck Me Daddy

b. Party Girls

c. Cunt Honey

d. Teeny Fuckers

7. On or about November 1, 1977, in Miami, Florida, the defendant RAY HIND did meet with an undercover Special Agent of the Federal Bureau of Investigation and agree to transport and cause to be transported in interstate commerce for sale and distribution from Los Angeles, California, to Miami, Florida, obscene, lewd, lascivous, and filthy films.

On or about November 8, 1977, in Miami, Florida, an undercover Special Agent of the Federal Bureau of Investigation did receive these items which included the following films:

Series	Films
a. The Players	Chocolate and Vanilla

b. Screw	Anal Passsions
c. Possessed	Wild Party Rape

8. On or about and between November 3, 1977, and November 4, 1977, in Providence, Rhode Island, the defendants KENNETH GUARINO, JOSEPH A. RENZI, JR., and ANTHONY "BUTCH" DI BONA did meet with an undercover Speical Agent of the Federal Bureau of Investigation and agreed to transport and cause to be transported in interstate commerce for sale and distribution from Providence, Rhode Island, to Miami, Florida, obscene, lewd, lascivious, and filthy films and magazines.

On or about November 18, 1977, in Miami, Florida, an undercover Special Agent of the Federal Bureau of Investigation did receive these items which included the following films:

Series	Films
a. Exotic Erotica	Deflowered Virgin
b. Stars of Sex	Asshole Lust

c. School Doctor

and the following magazines:

a. Animal Lovers #1

b. Animal Lovers #2

9. On or about and between November 15, 1977, and December 13, 1977, the defendant WALTER "FRENCHY" BAGNELL did knowingly transport and cause to be transported in interstate commerce for sale and distribution to Miami, Florida, obscene, lewd, lascivous, and filthy films including the following films:

	Series	Films
a.	Intimate Moments	#1 Jeff and Frank
b.	Intimate Moments	#2 Dale and Ed

10. On or about December 1, 1977, in Providence, Rhode Island, the defendants KENNETH GUARINO, JOSEPH A. RENZI, JR., and ANTHONY "BUTCH" DI BONA did meet with undercover Special Agents of the Federal Bureau of Investigation and did agree to transport and cause to be trans-

ported in interstate commerce for sale and distribution from Providence, Rhode Island, to Miami, Florida, obscene, lewd, lascivious, and filthy films.

On or about December 12, 1977, in Miami, Florida, an undercover Special Agent of the Federal Bureau of Investigation did receive these items, which included the following films:

Series	Films
a. Afternoon Delight	#3 Anal Sunset
b. Burning Film	#1 Teenage Vibrations
c.	School Doctor

11. On or about December 6, 1977, in Cleveland, Ohio, the defendants JOE ZERNIC and AL BLOOM, did meet with undercover Special Agents of the Federal Bureau of Investigation and did agree to transport and cause to be transported in interstate commerce for sale and distribution from Cleveland, Ohio, to Miami,

Florida, obscene, lewd, lascivious, and filthy films.

On or about December 12, 1977, in Miami, Florida, an undercover Speical Agent of the Federal Bureau of Investigation did receive these items, which included the following films:

Series	Films
a. Collection	#8 Jewish American Princess
b. Collection	#3 Mr. Footlong
c. Karla Schmidt	#357 Hand Fucker
d. Karla Schmidt	KS46 Alice's Baby

12. On or about February 1, 1978, in Cleveland, Ohio, the defendants JOE ZERNIC and AL BLOOM did meet with undercover Special Agents of the Federal Bureau of Investigation and did agree to transport and cause to be transported in interstate commerce for sale and distribution from Cleveland, Ohio, to Miami, Florida, obscene, lewd, lascivious, and filthy films and magazines.

On or about February 6, 1978, in Miami, Florida, an undercover Special Agent of the Federal Bureau of Investigation did receive these items, which included the following films:

Series	Films
a. Creme de la Creme	#6 Black and White Suck

and including the following magazines:

a. Connoisseur Series - Playing Hookey

b. Connoisseur Series - Three in a Tub

c. Pornoboy #12

13. On or about and between February 27, 1978, and March 2, 1978, the defendants JOE ZERNIC and STEVE "MARTIN" ASSID in Cleveland, Ohio, did engage in telephonic conversations with undercover Special Agents of the Federal Bureau of Investigation in Miami, Florida, and did agree to transport and cause to be transported in interstate commerce for sale and distribution from Cleveland, Ohio, to Miami, Florida,

obscene, lewd, lascivious, and filthy video tape cassettes.

On June 2, 1978, an undercover Special Agent of the Federal Bureau of Investigation in Miami, Florida, did receive these items, which included the following video tape cassettes:

a. Teenage Housewife

b. Desires Within Young Girls

c. Rights of Uranus

14. On or about March 7, 1978, in Chicago, Illinois, the defendants ANTHONY "TONY" DEFALCO and PAUL GORMAN did meet with undercover Special Agents of the Federal Bureau of Investigation and did agree to transport and cause to be transported in interstate commerce for sale and distribution from Chicago, Illinois, to Miami, Florida, obscene, lewd, lascivious, and filthy films.

On or about March 15, 1978, an undercover Special Agent of the Federal Bureau of Investigation in Miami, Florida, did

receive these items, which included the following films:

Series	Films
a. Esquire II	Five Way Ass Fuck Orgy
b. Club	Anal Secretary C24

15. On or about March 8, 1978, in Chicago, Illinois, the defendant LEO WEINTRAUB did meet with an undercover Special Agent of the Federal Bureau of Investigation and did agree to transport and cause to be transported in interstate commerce for sale and distribution from Chicago, Illinois, to Miami, Florida, obscene, lewd, lascivious, and filthy films.

On or about March 21, 1978, in Miami, Florida, an undercover Special Agent of the Federal Bureau of Investigation did receive these items, which included the following films:

Series	Films
a. Viva	Viva II

b. Dog Sex

16. On or about March 22, 1978, in San Francisco, California, the defendant LARRY NELSON did meet with an undercover Special Agent of the Federal Bureau of Investigation and did agree to transport and cause to be transported in interstate commerce for sale and distribution to Miami, Florida, obscene, lewd, lascivious, and filthy films and magazines.

On March 31, 1978, in Miami, Florida, an undercover Special Agent of the Federal Bureau of Investigation did receive these items, which included the following films:

	Series	Films
a.	Prick Teasers	Little Yummy
b.	Prick Teasers	Hot Anal Baby
c.	San Francisco Original "200"	#241 Girlfriend
d.	" " " "	#225 Mr. Footlong
e.	" " " "	#245 School Daze

and the following magazines:

a. Pickup Tricks

b. Glory Holes

17. On or about March 26, 1978, in Los Angeles, California, the defendant THEODORE "TEDDY" GASWIRTH did meet with undercover Special Agents of the Federal Bureau of Investigation and did agree to transport and cause to be transported in interestate commerce for sale and distribution from Los Angeles, California, to Miami, Florida, obscene, lewd, lascivious, and filthy films.

18. On or about April 6, 1978, in Miami, Florida, an undercover Special Agent of the Federal Bureau of Investigation did receive these items, which included the following films:

Series	Films
a. Scena D'Amore	SA-5 The Critic
b. Desire	#2 Phone Fuck
c. Desire	#4 Strip Poker

19. On or about March 29, 1978, the defendant RAY HIND engaged in a telphonic conversation with an undercover Special Agent of the Federal Bureau of Investigation in furtherance of this conspiracy. During the course of this conversation, the defendant RAY HIND discussed the activities of other members of the conspiracy.

20. On or about April 11, 1978, the defendant LARRY NELSON in San Francisco, California, did engage in a telephonic conversation with an undercover Special Agent of the Federal Bureau of Investigation in Miami, Florida, and did agree to transport and cause to be transported in interstate commerce for sale and distribution from San Francisco, California, to Miami, Florida, obscene, lewd, lascivious, and filthy films and magazines.

On or about April 25, 1978, in Miami, Florida, an undercover Special Agent of the Federal Bureau of Investigation did receive these items, which included the

following films:

Series	Films
a. San Francisco Ultragirl	#1 Eileen (Girl with the Golden Ass)
b. San Francisco Ultragirl	#2 Crystal

and the following magazines:

a. Carpet Layer

b. Car Job

21. On or about April 13, 1978, the defendant RAY HIND engaged in a telephonic conversation with an undercover Special Agent of the Federal Bureau of Investigation in furtherance of this conspiracy. During the course of this conversation, the defendant RAY HIND discussed the activities of other members of the conspiracy.

22. On or about and between April 16, 1978, and April 19, 1978, the defendants LARRY NELSON, THEODORE "TEDDY" ROTHSTEIN, ANDREW "ANDRE" D'APICE, RUBY GOTTESMAN, ROGER SUMMERS, JOE MALLEN, NORMAN "NORM"

ARNO, THOMAS SINOPOLI and AL TAPPER, did meet with each other and others in New Orleans, Louisiana.

23. On or about April 21, 1978, in New York City, New York the defendants ROBERT "DEBE" DI BERNARDO, THEODORE "TEDDY" ROTHSTEIN and ANDREW "ANDRE" D'APICE did meet with undercover Special Agents of the Federal Bureau of Investigation and did agree to transport and cause to be transported in interstate commerce for sale and distribution to Miami, Florida, obscene, lewd, lascivious, and filthy films.

On or about and between April 28, 1978, and June 12, 1978, in Miami, Florida, an undercover Special Agent of the Federal Bureau of Investigation did receive these films which included the following:

Series	Films
a. Soul Sex	#9 Black and White Finger Fuck
b. Soul Sex	#12 Black Couple's White Slave Boy

c. Scena D'Amore	SA-2 The Orgy
d. Scena D'Amore	SA-3 The Shower
e. Scena D'Amore	SA-4 The Lesbians
f. Supersound	SS1 Daddy's Girl
g. Supersound	SS3 Motel Orgy
h. Supersound	SS4 Virgin Maid
i. Mustang	Mustang I

24. On or about April 24, 1978, the defendant LARRY NELSON engaged in a telephonic conversation with an undercover Special Agent of the Federal Bureau of of Investigation in furtherance of this conspiracy. During the conversation, NELSON discussed a meeting in New Orleans, Louisiana.

25. On or about May 5, 1978, in Los Angeles, California, the defendants NORMAN "NORM" ARNO and THOMAS SINOPOLI in Los Angeles, California, did meet with an undercover Special Agent of the Federal Bureau of Investigation and did agree to transport and cause to be transported in

interstate commerce for sale and distribution from Los Angeles, California, to Miami, Florida, obscene, lewd, lascivious, and filthy video tape cassetes.

On or about May 10, 1978, an undercover Special Agent of the Federal Bureau of Investigation in Miami, Florida, did receive these video tape cassettes, which included the following:

a. Gemini Gemini

b. Deep Throat

c. All the Senator's Girls

and the following magazines:

a. Fuck Mania

b. Flesh NR 1

c. Party Girls 1

d. Costly Cunt Antics

e. Fuck Breakfast

26. On or about and between May 12, 1978, and May 22, 1978, the defendant LARRY NELSON did knowingly transport and

cause to be transported in interstate commerce for sale and distribution from San Francisco, California, to Miami, Florida, obscene, lewd, lascivious, and filthy films including the following film:

Series	Films
Manhandlers	Hard Packer

27. On or about May 17, 1978, the defendant NORMAN "NORM" ARNO engaged in a telephonic conversation with an undercover Special Agent of the Federal Bureau of Investigation in furtherance of this conspiracy. During the course of this conversation the defendant NORMAN "NORM" ARNO discussed the activities of other members of the conspiracy.

28. On or about May 29, 1978, the defendant THEODORE "TEDDY" GASWIRTH engaged in a telephonic conversation with an undercover Speical Agent of the Federal Bureau of Investigation in furtherance of this conspiracy. During

the course of this conversation the defendant THEODORE "TEDDY" GASWIRTH discussed the activities of other members of the conspiracy.

29. On or about July 8, 1978, in Los Angeles, California, the defendant NORMAN "NORM" ARNO did meet with an undercover Special Agent of the Federal Bureau of Investigation and did agree to transport and cause to be transported in interstate commerce for sale and distribution from Los Angeles, California, to Miami, Florida, obscene, lewd, lascivious, and filthy video tape cassettes.

On or about August 8, 1978, in Miami, Florida, an undercover Special Agent of the Federal Bureau of Investigation did receive these video tape cassettes, which included the following:

a. Bad Beulah

b. Hard Bargain

30. On or about July 9, 1978, the

defendant NORMAN "NORM" ARNO met with and engaged in a conversation with an undercover Special Agent of the Federal Bureau of Investigation in furtherance of this conspiracy. During the course of this conversation the defendant NORMAN "NORM" ARNO discussed the activities of other members of the conspiracy.

31. On or about July 15, 1978, the defendant NORMAN "NORM" ARNO engaged in a telephonic conversation with an undercover Special Agent of the Federal Bureau of Investigation in furtherance of this conspiracy. During the course of this conversation the defendant NORMAN "NORM" ARNO discussed the activities of other members of the conspiracy.

32. On or about July 27, 1978, in Los Angeles, California, the defendant ROLAND BOUDREAULT did meet with undercover Special Agents of the Federal Bureau

of Investigation and did agree to transport and cause to be transported in interstate commerce for sale and distribution from San Francisco, California, to Miami, Florida, obscene, lewd, lascivious, and filthy films and magazines.

On or about July 31, 1978, an undercover Special Agent of the Federal Bureau of Investigation did receive these films and magazines which included the following films:

Series	Films
a. San Francisco Original 200	#245 School Daze
b. San Francisco Original 200	#213 Sex Psycho
c. San Francisco Original 200	#225 Mr. Footlong
d. San Francisco Original 200	The Big Cunt
e. Manhandlers	Hard Packer
f. Swedish Erotica	#190

and the following magazines:

a. Manhandlers #3 Hard Packer

33. On or about September 5, 1978, the defendant ANDREW "ANDRE" D'APICE engaged in a telephonic conversation with an undercover Special Agent of the Federal Bureau of Investigation in furtherance of this conspiracy. During the course of this conversation the defendant ANDREW "ANDRE" D'APICE discussed the activities of other members of the conspiracy.

34. On or about September 26, 1978, in Los Angeles, California, the defendant THEODORE "TEDDY" GASWIRTH did meet with an undercover Special Agent of the Federal Bureau of Investigation and did agree to transport and cause to be transported in interstate commerce for sale and distribution from Los Angeles, California, to Miami, Florida, obscene, lewd, lascivious, and filthy films.

On or about October 29, 1978, in Miami, Florida, an undercover Special Agent of the Federal Bureau of Investigation did

receive these films which included the following:

Series	Films
a. Erotica Unlimited	#19 Dyke Finger
b. Erotica Unlimited	#18 Let's Play Doctor
c. Tenill Presents	Give the Maid a Raise

35. On or about and between October 15, 1978, and October 18, 1978, the defendants LARRY NELSON, JOE ZERNIC, THEODORE "TEDDY" ROTHSTEIN, ANTHONY "TONY" DEFALCO, PAUL GORMAN, AL TAPPER, KENNETH GUARINO, JOE MALLEN and ROGER SUMMERS, did meet with each other and others in Seattle, Washington.

36. On or about October 15, 1978, the defendant ANTHONY "TONY" DEFALCO, in Seattle Washington, did meet with an undercover Special Agent of the Federal Bureau of Investigation and engage in a conversation in furtherance of this conspiracy.

During the course of the conversation the defendant ANTHONY "TONY" DEFALCO discussed the activities of other members of the conspiracy.

37. On or about October 30, 1978, the defendant MARTY BERNBACK engaged in a telephonic conversation with an undercover Special Agent of the Federal Bureau of Investigation in furtherance of this conspiracy. During the course of this conversation the defendant MARTY BERNBACK discussed the activities of other members of the conspiracy.

38. On or about and between October 5, 1978, and November 21, 1978, the defendant PHILLIP CHARLES "CHUCK" BERNSTENE did knowingly transport and cause to be transported in interstate commerce for sale and distribution to Miami, Florida, obscene, lewd, lascivious, and filthy video tape cassettes including the following video tape cassettes:

Series	Films
a. Swedish Erotica	Volume I
b. Swedish Erotica	Volume II
c.	Baby Face

39. On or about November 20, 1978, the defendant THEODORE "TEDDY" GASWIRTH engaged in a telephonic conversation with an undercover Special Agent of the Federal Bureau of Investigation in furtherance of this conspiracy. During the course of this conversation the defendant THEODORE "TEDDY" GASWIRTH discussed the activities of other members of the conspiracy.

40. On or about December 1, 1978, in Los Angeles, California, the defendant JERRY WADE met with an undercover Special Agent of the Federal Bureau of Investigation and did agree to transport and cause to be transported in interstate commerce for sale and distribution to Miami, Florida, obscene, lewd, lascivious, and filthy video tape cassettes.

On or about December 11, 1978, in Miami, Florida, an undercover Special Agent of the Federal Bureau of Investigation did receive these video tape cassettes, which included the following:

a. Introductions

b. Teenage Twins

41. On or about December 13, 1978, the defendant RUBY GOTTESMAN engaged in a telephonic conversation with an undercover Special Agent of the Federal Bureau of Investigation in furtherance of this conspiracy. During the course of this conversation the defendant RUBY GOTTESMAN discussed the activities of other members of the conspiracy.

42. On or about January 23, 1979, in Los Angeles, California, the defendants HARRY MOHNEY and JERRY WADE did meet with undercover Special Agents of the Federal Bureau of Investigation and did agree to transport and cause to be transported in interstate commerce for sale and distri-

bution to Miami, Florida, obscene, lewd, lascivious, and filthy video tape cassettes.

On or about March 5, 1979, an undercover Special Agent of the Federal Bureau of Investigation did receive these video tape cassettes, which included the following:

a. Hollywood Cowboy

b. Golden Boys of the SS

c. Gail Palmer's Erotic Adventures of Candy

43. On or about February 6, 1979, the defendant RUBY GOTTESMAN engaged in a telephonic conversation with an undercover Special Agent of the Federal Bureau of Investigation in furtherance of this conspiracy. During the course of this conversation the defendant RUBY GOTTESMAN discussed the activities of other members of the conspiracy.

44. On or about and between March 13, 1979, and March 27, 1979, the defendant

ANDREW "ANDRE" D'APICE did knowingly transport and cause to be transported in interstate commerce for sale and distribution to Miami, Florida, obscene, lewd, lascivious, and filthy video tape cassettes including the following video tape cassettes:

a. Bedroom Bedlam

b. Dr. Teen Dilemma

45. On or about and between March 24, 1979, and March 26, 1979, the defendants LARRY NELSON, THEODORE "TEDDY" GASWIRTH, HARRY MOHNEY, ANDREW "ANDRE" D'APICE, THEODORE "TEDDY" ROTHSTEIN, ANTHONY "TONY" DEFALCO, MARTY BERNBACK, THOMAS SINOPOLI, NORMAN "NORM" ARNO, AL TAPPER, KENNETH GUARINO, ROGER SUMMERS and ROGER CHAN, did meet with each other and others in Miami, Florida.

46. On or about March 27, 1979, the defendant ANDREW "ANDRE" D'APICE met with and engaged in a conversation with an

undercover Special Agent of the Federal Bureau of Investigation in furtherance of this conspiracy. During the course of this conversation the defendant ANDREW "ANDRE" D'APICE discussed the activities of other members of the conspiracy.

47. On or about May 29, 1979, in Los Angeles, California, the defendant ARNIE HIMMELSTEIN did engage in a telephonic conversation with an undercover Special Agent of the Federal Bureau of Investigation concerning the price at which the agent could purchase obscene, lewd, lascivious and filthy video tape cassettes.

48. On or about May 29, 1979, in Los Angeles, California, the defendant MICHAEL BALSAMO did meet with undercover Special Agents of the Federal Bureau of Investigation and did agree to transport and cause to be transported in interstate commerce for sale and distribution to Miami,

Florida, obscene, lewd, lascivious, and filthy video tape cassettes.

On or about July 9, 1979, in Miami, Florida, an undercover Special Agent of the Federal Bureau of Investigation did receive these video tape cassettes, which included the following:

a. Candy Stripers

b. Hollywood Cowboy

c. His Master's Touch

49. On or about July 5, 1979, the defendant VINCE DI STEPHANO in Los Angeles, California, engaged in a telephonic conversation with an undercover Special Agent of the Federal Bureau of Investigation in Miami, Florida, and provided that agent with the airbill number of the shipment of video tape cassettes referred to in Overt Act #48.

50. On or about June 13, 1979, the defendant RUBY GOTTESMAN engaged in a telephonic conversation with an undercover

Special Agent of the Federal Bureau of Investigation in furtherance of this conspiracy. During the course of this conversation the defendant RUBY GOTTESMAN discussed the activities of other members of the conspiracy.

51. On or about June 27, 1979, the defendant RUBY GOTTESMAN engaged in a telephonic conversation with an undercover Special Agent of the Fedearl Bureau of Investigation in furtherance of this conspiracy. During the course of this conversation the defendant RUBY GOTTESMAN discussed the activities of other members of the conspiracy.

52. On or about June 29, 1979, the defendant RUBY GOTTESMAN engaged in a telephonic conversation with an undercover Special Agent of the Federal Bureau of Investigation in furtherance of this conspiracy. During the course of this

conversation the defendant RUBY GOTTESMAN discussed the activities of other members of the conspiracy.

53. On or about July 14, 1979, the defendant PHILLIP CHARLES "CHUCK" BERNSTENE engaged in a telephonic conversation with an undercover Special Agent of the Federal Bureau of Investigation in furtherance of this conspiracy. During the course of this conversation the defendant PHILLIP CHARLES "CHUCK" BERNSTENE discussed the activities of other members of the conspiracy.

54. On or about and between August 13, 1979, and August 22, 1979, the defendant ANDREW "ANDRE" D'APICE did knowingly transport and cause to be transported in interstate commerce for sale and distribution to Miami, Florida, obscene, lewd, lascivious, and filthy video tape cassettes including the following video tape cassettes:

a. Falcon Series No. 1
The Other Side of Aspen

b. Water Power

c. Truck It

d. L.A. Plays Itself

55. On or about August 22, 1979, the defendant RUBY GOTTESMAN engaged in a telephonic conversation with an undercover Special Agent of the Federal Bureau of Investigation in furtherance of this conspiracy. During the course of this conversation the defendant RUBY GOTTESMAN discussed the activities of other members of the conspiracy.

56. On or about March 24, 1978, in Los Angeles, California, the defendants ROGER SUMMERS and JOE MALLEN met with undercover Special Agents of the Federal Bureau of Investigation and discussed transporting obscene, lewd, lascivious and filthy films in interstate commerce from Los Angeles, California, to Miami, Florida, via a third state.

57. On or about September 6, 1979, in Los Angeles, California, the defendants

AL BLOOM, ROGER SUMMERS and ROGER CHAN did meet with undercover Special Agents of the Federal Bureau of Investigation and did agree to transport and cause to be transported in interstate commerce for sale and distribution from Los Angeles, California, to Miami, Florida, obscene, lewd, lascivious, and filthy video tape cassettes.

On or about September 11, 1979, in Miami, Florida, an undercover Special Agent of the Federal Bureau of Investigation did receive these video tape cassettes, which included the following:

	Series	Films
a.	Swedish Erotica	#12
b.	Swedish Erotica	#13
c.	Swedish Erotica	#14

58. On or about September 7, 1979, in Los Angeles, California, the defendants JOSEPH "JOE BLACK" ARIENO and ROBERT "BOBBY" ZEICHICK did engage in telephonic conversations with, and the defendant

ROBERT "BOBBY" ZEICHICK did meet with an undercover Special Agent of the Federal Bureau of Investigation and did agree to transport and cause to be transported in interstate commerce for sale and distribution from Los Angeles, California, to Miami, Florida, a number of copies of an obscene, lewd, lascivious, and filthy video tape cassette of the motion picture:

Debbie Does Dallas

59. On or about September 13, 1979, the defendant ROGER CHAN engaged in a telephonic conversation with an undercover Special Agent of the Federal Bureau of Investigation in furtherance of this conspiracy. During the course of this conversation the defendant ROGER CHAN discussed the activities of other members of the conspiracy.

60. On or about September 18, 1979, the defendants JOSEPH "JOE BLACK" ARIENO

and ROBERT "BOBBY" ZEICHICK, in Los Angeles, California, did engage in a telephonic conversation with an undercover Special Agent of the Federal Bureau of Investigation in Miami, Florida, and did agree to transport and cause to be transported in interstate commerce for sale and distribution from Los Angeles, California, to Miami, Florida, obscene, lewd, lascivious, and filthy video tape cassettes.

On October 16, 1979, in Miami, Florida, an undercover Special Agent of the Federal Bureau of Investigation did receive these video tape cassettes, which included the following:

a. Expensive Taste

b. Little Girl Blue

c. Debbie Does Dallas

61. On or about October 26, 1979, the defendant PHILLIP CHARLES "CHUCK" BERNSTENE, in Los Angeles, California,

did engage in a telephonic conversation with an undercover Special Agent of the Federal Bureau of Investigation in Colorado Springs, Colorado, and informed the agent that BERNSTENE had received video tape cassettes of the motion picture Debbie Does Dallas dubbed in Spanish from the defendants BILL JACKMORE and TONY ARNONE in Florida.

62. On or about October 29, 1979, in Las Vegas, Nevada, the defendant PHILLIP CHARLES "CHUCK" BERNSTENE gave to an undercover Special Agent of the Federal Bureau of Investigation a sample video tape cassette of the motion picture Debbie Does Dallas, which BERNSTENE stated had been shipped to California from Fort Lauderdale, Florida, by the defendants BILL JACKMORE and TONY ARNONE.

63. On or about December 24, 1979, in Miami, Florida, an undercover Special Agent of the Federal Bureau of Investigation

received video tape cassettes which had been caused to be transported in interstate commerce for sale and distribution from Los Angeles, California, by the defendant PHILLIP CHARLES "CHUCK" BERNSTENE. These obscene, lewd, lascivious, and filthy video tape cassettes included the following items:

a. Debbie Does Dallas (in Spanish)

b. Deep Throat (in Spanish)

64. On or about and between September 6, 1979, and October 2, 1979, the defendant ROGER CHAN did knowingly transport and cause to be transported in interstate commerce for sale and distribution from Los Angeles, California, to Miami, Florida, obscene, lewd, lascivious, and filthy video tape cassettes including the following video tape cassette:

Series	Film
Swedish Erotica	Volume 15

65. On or about November 1, 1979, the defendant BILL JACKMORE in Fort Lauderdale, Florida, did engage in a telephonic conversation with the defendant PHILLIP CHARLES "CHUCK" BERSTENE in Los Angeles, California, and did discuss the transportation of obscene, lewd, lascivious and filthy video tape cassettes in interstate commerce.

66. On or about November 9, 1979, the defendant TONY ARNONE in Fort Lauderdale, Florida, did engage in a telephonic conversation with the defendant PHILLIP CHARLES "CHUCK" BERNSTENE in Los Angeles, California, and did discuss the transportation of obscene, lewd, lascivious and filthy video tape cassettes in interstate commerce.

67. On or about and between October 10, 1979, and October 22, 1979, the defendant LOUIS "BUTCHIE" PERAINO did knowingly transport and cause to be

transported in interstate commerce for sale and distribution to Miami, Florida, obscene, lewd, lascivious, and filthy video tape cassettes including the following video tape cassettes:

a. Confessions of Linda Lovelace

b. Touch of Sex

c. Preview Package

d. Candy Stripers

68. On or about October 17, 1979, the defendant LOUIS "BUTCHIE" PERAINO met with and engaged in a conversation with an undercover Special Agent of the Federal Bureau of Investigation in furtherance of this conspiracy. During the course of this conversation the defendant LOUIS "BUTCHIE" PERAINO discussed the activities of other members of the conspiracy.

69. On or about and between November 30, 1979, and December 5, 1979, the defendant LOUIS "BUTCHIE" PERAINO did knowingly transport and cause to be transported in interstate commerce for

sale and distribution to Miami, Florida, obscene, lewd, lascivious, and filthy video tape cassettes including the following video tape cassettes:

a. Liquid Lips

b. Hot and Saucy Pizza Girls

c. Candy Stripers

70. On or about and between October 25, 1979, and October 28, 1979, the defendants ANDREW "ANDRE" D'APICE, THEODORE "TEDDY" ROTHSTEIN, MARTY BERNBACK, THOMAS SINOPOLI, NORMAN" NORM" ARNO, KENNETH GUARINO and AL TAPPER did meet with each other and others in Colorado Springs, Colorado.

71. On or about October 28, 1979, the defendant RUBY GOTTESMAN engaged in a telephonic conversation with an undercover Special Agent of the Federal Bureau of Investigation in furtherance of this conspiracy. During the course of this

conversation the defendant RUBY GOTTESMAN discussed the activities of other members of the conspiracy.

72. On or about October 29, 1979, the defendant PHILLIP CHARLES "CHUCK" BERNSTENE met with an undercover Special Agent of the Federal Bureau of Investigation in furtherance of this conspiracy. During the course of this conversation the defendant PHILLIP CHARLES "CHUCK" BERNSTENE discussed the activities of other members of the conspiracy.

73. On or about November 7, 1979, the defendant TONY ARNONE engaged in a telephonic conversation with an undercover Special Agent of the Federal Bureau of Investigation in furtherance of this conspiracy. During the course of this conversation the defendant TONY ARNONE discussed the activities of other members of the conspiracy.

74. On or about November 26, 1979, the defendant JOSEPH "JOE BLACK" ARIENO engaged in a telephonic conversation with an undercover Special Agent of the Federal Bureau of Investigation in furtherance of this conspiracy. During the course of this conversation the defendant JOSEPH "JOE BLACK" ARIENO discussed the activities of other members of the conspiracy.

75. On or about January 5, 1980, in Las Vegas, Nevada, the defendant RUBIN STURMAN did discuss with an undercover Special Agent of the Federal Bureau of Investigation shipments of obscene, lewd, lascivious and filthy films and video tape cassettes which had been previously transported to the agent in interstate commerce.

76. On or about and between January 4, 1980, and January 8, 1980, the defendants THEODORE "TEDDY" ROTHSTEIN, HARRY MOHNEY, NORMAN "NORM" ARNO, ARNIE HIMMELSTEIN, RUBIN STURMAN, ROGER CHAN, ROGER

SUMMERS, MARTY BERNBACK, ANDREW "ANDRE" D'APICE, MICHAEL BALSAMO, NOEL CHARLES BLOOM, THEODORE "TEDDY" GASWIRTH, THOMAS SINOPOLI, PHILLIP CHARLES "CHUCK" BERNSTENE, JOSEPH "JOE BLACK" ARIENO, RAY HIND, AL BLOOM, VINCE DI STEPHANO, KENNETH GUARINO, LARRY NELSON, JOSEPH "JOE" PERAINO and MICHAEL "MICKEY" ZAFFARANO did meet with each other and others in Las Vegas, Nevada.

77. On or about January 10, 1980, in Los Angeles, California, the defendant JOHN "J.B." "LA GRAND" BELMONT did meet with an undercover Special Agent of the Federal Bureau of Investigation and agreed to transport and cause to be transported in interstate commerce for sale and distribution obscene, lewd, lascivious and filthy video tape cassettes including California Gigolo.

On or about January 28, 1980, in Miami, Florida, an undercover Special Agent of

the Federal Bureau of Investigation did receive the video tape cassette:

California Gigolo

78. On or about December 26, 1979, the defendant LOUIS "LOU" GUGLIELMI engaged in a telephonic conversation with an undercover Special Agent of the Federal Bureau of Investigation and discussed an order for obscene, lewd, lascivious and filthy film.

On or about December 28, 1979, the defendant LOUIS "LOU" GUGLIELMI engaged in a telephonic conversation with an undercover Special Agent of the Federal Bureau of Investigation in Miami, Florida, and did agree to transport and cause to be transported in interstate commerce to Miami, Florida for sale and distribution obscene, lewd, lascivious and filthy films.

On or about January 15, 1980, an undercover Special Agent of the Federal

Bureau of Investigation did receive the following films:

Series	Title
a. Tad's Lads	Fucking Ma Bell
b. Tad's Lads	Dumb Little Honkie

79. On or about January 30, 1980, in New York City, New York, the defendant MICHAEL "MICKEY" ZAFFARANO did meet with an undercover Special Agent of the Federal Bureau of Investigation and did confirm that he had given the defendant JOSEPH "JOE BLACK" ARIENO permission to distribute the motion picture Debbie Does Dallas on video tape cassettes.

All in violation of Title 18, United States Code, Section 371.

THE GRAND JURY FURTHER CHARGES THAT:

COUNT 2

On or about and between March 24, 1978, and October 29, 1978, the defendant TEDDY GASWIRTH did knowingly transport in interstate commerce to the Southern District of Florida for the purpose of sale and distribution, obscene, lewd, lascivious, and filthy pamphlets, pictures, motion picture films, writings, electrical transcriptions and other matters of indecent character, to wit: the following 8 millimeter films:

Give the Maid a Raise, from the Tenill Presents Series

The Critic SAS, from the European Erotica Scena D'Amore Series

Phone Fuck, from the Desire Series

Strip Poker, from the Desire Series

Dyke Finger #19, from the Erotica Unlimited Series

Let's Play Doctor #18, from the Erotica Unlimited Series

All in violation of Title 18, United States Code, Sections 1465 and 2.

THE GRAND JURY FURTHER CHARGES THAT:

COUNT 3

On or about and between October 12, 1977, and March 15, 1978, the defendants ANTHONY "TONY" DEFALCO and PAUL GORMAN did knowingly transport in interstate commerce to the Southern District of Florida for the purpose of sale and distribution obscene, lewd, lascivious and filthy pamphlets, pictures, motion picture films, electrical transcriptions and other matters of indecent character, to wit:

a) The following 8 millimeter films:

Dog Sex

Five Way Ass Fuck Orgy, from the Esquire II Series

Anal Secretary

Little Big Man, from the Inger Brent Series

A2 Black Dog, from the Ball Buster Series

A4 Horse Fuckers, from the Ball Buster Series

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b) The following magazines:

Fuck Me Daddy

Cherry Love

All in violation of Title 18, United States Code, Sections 1465 and 2.

THE GRAND JURY FURTHER CHARGES THAT:

COUNT 4

On or about and between September 8, 1977, and December 13, 1977, the defendant WALTER BAGNELL did knowingly transport in interstate commerce to the Southern District of Florida for the purpose of sale and distribution obscene, lewd, lascivious and filthy pamphlets, pictures, motion picture films, electrical transcriptions and other matters of indecent character, to wit: the following 8 millimeter films:

Fifty Dollar Fuck, from the Sexual World Series #5

Poker Prick, from the Sexual World Series #1

Hula Whore, from the Sexual World Series #4

Jeff and Frank, from the Intimate Moments Series #1

Dale and Ed, from the Intimate Moments Series #2

All in violation of Title 18, United States Code, Sections 1465 and 2.

THE GRAND JURY FURTHER CHARGES THAT:

COUNT 5

On or about and between December 6, 1977, and June 2, 1978, the defendants RUBIN STURMAN, JOE ZERNIC, AL BLOOM and STEVE "MARTIN" ASSID did knowingly transport in interstate commerce to the Southern District of Florida for the purpose of sale and distribution obscene, lewd, lascivious and filthy pamphlets, pictures, motion picture films, electrical transcriptions and other matters of indecent character, to wit:

a) The following video tape cassettes of motion pictures:

Teenage Housewife

Desires Within Young Girls

Rights of Uranus

b) The following 8 millimeter films:

Jewish American Princess No. 8, from the Collection Series

Mr. Footlong No. 3, from the Collection Series

#357 Hand Fucker, from the Karla Schmidt Series

No. 464 Alice's Baby, from the Karla Schmidt Series

No. 6 Black and White Suck, from Creme De La Creme Series

c) The following magazines:

Playing Hookey, from the Connoisseur Series

Three in a Tub, from the Connoisseur Series

Pornoboy #12

All in violation of Title 18, United States Code, Sections 1465 and 2.

THE GRAND JURY FURTHER CHARGES THAT:

COUNT 6

On or about and between March 22, 1978, and July 31, 1978, the defendants LARRY NELSON and ROLAND BOUDREAULT did knowingly transport in interstate commerce to the Southern District of Florida for the purpose of sale and distribution obscene, lewd, lascivious and filthy pamphlets, pictures, motion picture films, electrical transcriptions and other matters of indecent character, to wit:

a) The following 8 millimeter films:

School Daze, from the San Francisco Original 200 Series #245

Little Yummy, from the Prick Teasers Series #1

Hot Anal Baby, from the Prick Teasers Series #3

Girlfriend #241

Mr. Footlong, from the San Francisco Original 200 Series #225

Eileen, Girl With The Golden Ass, from the San Francisco Ultragirl #1 Series

Sex Psycho, from the San Francisco Original 200 Series #213

Crystal, from the San Francisco Ultragirl #2 Series

Hardpacker, from the Manhandlers Series #3

The Big Cunt, from the San Francisco Original 200 Series

Swedish Erotica #190

b) The following magazines:

Glory Holes

Pick Up Tricks

Carpet Layer

Car Job

Hard Packer

All in violation of Title 18, United States Code, Sections 1465 and 2.

THE GRAND JURY FURTHER CHARGES THAT:

COUNT 7

On or about and between November 3, 1977, and December 12, 1977, the defendants KENNETH GUARINO, JOSEPH A. RINZI, JR., and ANTHONY "BUTCH" DIBONA did knowingly transport in interstate commerce to the Southern District of Florida for the purpose of sale and distribution obscene, lewd, lascivious and filthy pamphlets, pictures, motion picture films, electrical transcriptions and other matters of indecent character, to wit:

a) The following 8 millimeter films:

School Doctor

The Deflowered Virgin from the Exotic Erotica Series

Asshold Lust from the Start of Sex Series

Anal Sunset from the Afternoon Delight Series No. 3

Teenage Vibrations from the Burning Film Series No. 1

b) The following magazines;

Animal Lovers #1

Animal Lovers #2

All in violation of Title 18, United States Code, Sections 1465 and 2.

THE GRAND JURY FURTHER CHARGES THAT:

COUNT 8

On or about and between May 29, 1979, and December 5, 1979, the defendants LOUIS "BUTCHIE" PERAINO, JOSEPH "JOE" PERAINO, MICHAEL BALSAMO, VINCE DI STEPHANO, and ARNIE HIMMELSTEIN did knowingly transport in interstate commerce to the Southern District of Florida for the purpose of sale and distribution, obscene, lewd, lascivious, and filthy pamphlets, pictures, motion picture films, writings, electrical transcriptions and other matters of indecent character, to wit: the following video tape cassettes of motion pictures:

His Master's Touch

Hollywood Cowboy

Candy Stripers

Confessions of Linda Lovelace

Preview Package

Touch of Sex

Liquid Lips

Hot and Saucy Pizza Girls

All in violation of Title 18, United States Code, Sections 1465 and 2.

THE GRAND JURY FURTHER CHARGES:

COUNT 9

On or about and between September 6, 1979, and October 2, 1979, the defendants NOEL BLOOM, ROGER SUMMERS, JOE MALLEN, and ROGER CHAN did knowingly transport in interstate commerce to the Southern District of Florida for the purpose of sale and distribution, obscene, lewd, lascivious, and filthy pamphlets, pictures, motion picture films, writings, electrical transcriptions and other matters of indecent character, to wit: the following video tape cassettes of the motion pictures:

Swedish Erotica Volume 12

Swedish Erotica Volume 13

Swedish Erotica Volume 14

Swedish Erotica Volume 15

All in violation of Title 18, United States Code, Sections 1465 and 2.

THE GRAND JURY FURTHER CHARGES THAT:

COUNT 10

On or about and between October 5, 1978, and November 21, 1978, the defendants PHILLIP CHARLES "CHUCK" BERNSTENE and TIMOTHY "TIM SIMPSON" BURNS did knowingly transport in interstate commerce to the Southern District of Florida for the purpose of sale and distribution, obscene, lewd, lascivious, and filthy pamphlets, pictures, motion picture films, writings, electrical transcriptions and other matters of indecent character, to wit: the following video tape cassettes of the motion pictures:

Baby Face

Swedish Erotica I

Swedish Erotica II

All in violation of Title 18, United States Code, Sections 1465 and 2.

THE GRAND JURY FURTHER CHARGES THAT:

COUNT 11

On or about and between October 1, 1979, and December 24, 1979, the defendants TONY ARNONE, BILL JACKMORE, and PHILLIP CHARLES "CHUCK" BERNSTENE did knowingly transport in interstate commerce to the Southern District of Florida for the purpose of sale and distribution, obscene, lewd, lascivious and filthy pamphlets, pictures, motion picture films, writings, electrical transcriptions and other matters of indecent character, to wit: the following video tape cassettes of motion pictures:

Debbie Does Dallas (in Spanish)

Deep Throat (in Spanish)

All in violation of Title 18, United States Code, Sections 1465 and 2.

THE GRAND JURY FURTHER CHARGES THAT:

COUNT 12

On or about and between September 6, 1979, and October 16, 1979, the defendants JOSEPH "JOE BLACK" ARIENO, MICHAEL "MICKEY" ZAFFARANO, LARRY MATHES and BOBBY ZEICHICK did knowingly transport in interstate commerce to the Southern District of Florida for the purpose of sale and distribution, obscene, lewd, lascivious, and filthy pamphlets, pictures, motion picture films, writings, electrical transcriptions and other matters of indecent character, to wit: the following video tape cassettes of motion pictures:

Debbie Does Dallas

Expensive Taste

Little Girl Blue

All in violation of Title 18, United States Code, Sections 1465 and 2.

THE GRAND JURY FURTHER CHARGES THAT:

COUNT 13

On or about and between December 1, 1978, and January 28, 1980, the defendants HARRY MOHNEY, JERRY WADE and JOHN "J.B." BELMONT did knowingly transport in interstate commerce to the Southern District of Florida for the purpose of sale and distribution, obscene, lewd, lascivious, and filthy pamphlets, pictures, motion picture film, writings, electrical transcriptions and other matters of indecent character, to wit: the following video tape cassettes of motion pictures:

Introductions

Teenage Twins

Hollywood Cowboy

Golden Boys of the SS

Gail Palmer's Exotic Adventures of Candy

California Gigolo

All in violation of Title 18, United States Code, Sections 1465 and 2.

THE GRAND JURY FURTHER CHARGES THAT:

COUNT 14

On or about and between March 8, 1978, and March 21, 1978, the defendant LEO WEINTRAUB did knowingly transport in interstate commerce to the Southern District of Florida for the purpose of sale and distribution obscene, lewd, lascivious and filthy pamphlets, pictures, motion picture films, electrical transcriptions and other matters of indecent character, to wit: the following 8 millimeter films:

Viva II of the Viva Series

Dog Sex

All in violation of Title 18, United States Code, Sections 1465 and 2.

THE GRAND JURY FURTHER CHARGES THAT:

COUNT 15

On or about and between April 21, 1978, and August 22, 1979, the defendants ROBERT "DEBE" DI BERNARDO, THEODORE "TEDDY" ROTHSTEIN and ANDREW "ANDRE" D'APICE did knowingly transport in interstate commerce to the Southern District of Florida for the purpose of sale and distribution, obscene, lewd, lascivious, and filthy pamphlets, pictures, motion picture films, writings, electrical transcriptions and other matters of indecent character, to wit:

a) The following video tape cassettes of motion pictures:

The Other Side of Aspen, from the Falcon Series No. 1

Water Power

Truck It

L.A. Plays Itself

Bedroom Bedlam

Dr. Teen Dilemma

b) The following 8 millimeter films:

The Orgy SA-2, from the Scena D'Amore Series

The Lesbians SA-4, from the Scena D'Amore Series

The Shower SA-3, from the Scena D'Amore Series

Daddy's Girl SS1, from the Supersound Series

Motel Orgy SS3, from the Supersound Series

Virgin Maid SS4, from the Supersound Series

Mustang I

Black and White Finger Fun #9, from the Soul Sex Series

Black Couple's White Slave Boy #12, from the Soul Sex Series

All in violation of Title 18, United States Code, Sections 1465 and 2.

THE GRAND JURY FURTHER CHARGES THAT:

COUNT 16

On or about and between September 8, 1977, and August 8, 1978, the defendants NORMAN "NORM" ARNO, MARTY BERNBACK, THOMAS SINOPOLI, DONALD "SANDY" SARNBLAD, TIMOTHY "TIM SIMPSON" BURNS and MICHAEL "MICKEY" ZAFFARANO did knowingly transport in interstate commerce to the Southern District of Florida for the purpose of sale and distribution obscene, lewd, lascivious, and filthy pamphlets, pictures, motion picture films, writings, electrical transcriptions, and other matters of indecent character, to wit:

a) The following video tape cassettes of motion pictures:

Gemini Gemini

Deep Throat

All the Senator's Girls

Bad Beulah

Hard Bargain

b) The following 8 millimeter films:

Marilyn Chambers Story in Hardcore

c) The following magazines:

Wet Dream

Fifteen 15 No. 14

Spread Your Legs

Young and Tender

Pornoboy II

Cumin'

Fuck Maria

Flesh NR 1

Party Girls 1

Costly Cunt Antics

Fuck Breakfast

All in violation of Title 18, United States Code, Sections 1465 and 2.

THE GRAND JURY FURTHER CHARGES THAT:

COUNT 17

On or about and between September 7, 1977, and November 8, 1977, the defendants RAY HIND and AL TAPPER did knowingly transport in interstate commerce to the Southern District of Florida for the purpose of sale and distribution obscene, lewd, lascivious and filthy pamphlets, pictures, motion picture films, electrical transcriptions and other matters of indecent character, to wit:

a) The following 8 millimeter films:

The Tigress, from the Orgy Erotica Series

Chocolate and Vanilla, from the Players Series

Tennis Balls, from the Eruption Series

Backside Fever, from the Lasse-Braun America Series

Anal Passions, from the Screw Series

Wild Party Rape, from the Possessed Series

b) The following magazines:

Humping #2

Sweet Sixteen

Bleeding Pussy

Fuck Me Daddy

Party Girls

Cunt Honey

Teeny Fuckers

All in violation of Title 18, United States Code, Sections 1465 and 2.

THE GRAND JURY FURTHER CHARGES THAT:

COUNT 18

On or about and between December 26, 1979, and January 15, 1980, the defendant LOU GUGLIELMI did knowingly transport in interstate commerce to the Southern District of Florida for the purpose of sale and distribution obscene, lewd, lascivious and filthy pamphlets, pictures, motion picture films, electrical transcriptions and other matters of indecent character, to wit: the following 8 millimeter films:

Fucking Ma Bell, from the Tad's Lad's Series

Dumb Little Honkie, from the Tad's Lad's Series

All in violation of Title 18, United States Code, Sections 1465 and 2.

A TRUE BILL:

_____
FOREMAN

/s/J.V. Eskenazi
J.V. Eskenazi
United States Attorney

/s/Atlee W. Wampler III
ATLEE W. WAMPLER III
Attorney in Charge

/s/Fred A. Schwartz
FRED A. SCHWARTZ
Special Attorney

/s/Marcella Cohen
MARCELLA COHEN
Special Attorney

IN THE UNITED STATES COURT FOR THE

WESTERN DISTRICT OF PENNYSLVANIA

UNITES STATES OF AMERICA	)	
	)	No. 78-208 Criminal
v.	)	
	)	(18 U.S.C., Sections
REUBEN STURMAN	)	371, 1465, and 2)
MELVIN KAMINS	)	
GREGORY KOCAN	)	
SANDY SCHRAGO	)	
RICHARD JENKINS	)	
JAMES CALDERONE	)	

The grand jury charges:

That from on or about the 1st day of January, 1974, through on or about the 18th day of July, 1977, in the Western District of Pennsylvania, and elsewhere, REUBEN STURMAN, MELVIN KAMINS, GREGORY KOCAN, SANDY SCHRAGO, RICHARD JENKINS and JAMES CALDERONE, the defendants herein, along with Richard Allen Torch and Phyllis Johns, named herein as unindicted co-conspirators, did wilfully and knowingly combine, conspire, confederate and agree

together and with each other, and with other persons whose names at the present are both known and unknown, to commit certain offenses against the United States, that is, to knowingly use and cause to be used common carriers for the carriage in interstate commerce of obscene, lewd, lascivious, and filthy magazines and motion picture films, in violation of Title 18, United States Code, Sections 1462 and 2, and to knowingly transport and cause to be transported in interstate commerce for the purpose of sale and distribution, obscene, lewd, lascivious, and filthy magazines and motion picture films, in violation of Title 18, United States Code, Sections 1465 and 2.

It was a part of the conspiracy that the defendants, REUBEN STURMAN, MELVIN KAMINS and SANDY SCHRAGO, and others, would occupy premises located at 2075 East 65th Street, Cleveland, Ohio, utilizing the names

Sovereign News Company and/or Western Reserve Enterprises, Ltd.

It was further a part of the conpiracy that the defendants, GREGORY KOCAN, RICHARD JENKINS and JAMES CALDERONE, and others, would and did occupy premises located at 922 West North Avenue in Pittsburgh, Pennsylvania, utilizing the name Majestic News Company.

It was further a part of the conspiracy that the defendants, REUBEN STURMAN, MELVIN KAMINS and SANDY SCHRAGO, and others, would and did periodically cause memoranda and instructions to be forwarded from Cleveland, Ohio, to GREGORY KOCAN at the Majestic News Company, located at 922 West North Avenue, Pittsburgh, Pennsylvania.

It was further a part of the conspiracy that the defendants, GREGORY KOCAN and RICHARD JENKINS, and others, would and did receive from locations outside the state of Pennsylvania, obscene, lewd,

lascivious, and filthy magazines and motion picture films for the purpose of sale and distribution in the states of Pennsylvania, West Virginia, Ohio and New York.

It was further a part of the conspiracy that the defendants, REUBEN STURMAN, MELVIN KAMINS and GREGORY KOCAN, and others, using the Majestic News Company in Pittsburgh, Pennsylvania, would supply obscene, lewd, lascivious, and filthy magazines and motion picture films to, and control the activities of, the following stores: G & P Co., Inc.; Golden Triangle News; Eastern Books, Inc.; L.A.S. Corp.; Market Street News; Mello News; Monroeville News; McKnight Road News; P.N.S. Corp.; and Uptown Book Shop.

It was further a part of the conspiracy that the defendant, REUBEN STURMAN, would cause an employee to periodically travel

to Pennsylvania and West Virginia for the purpose of inspecting and directing the activities of those ten stores referred to above, and that said employee would thereafter report to REUBEN STURMAN in Cleveland, Ohio.

It was further a part of the conspiracy that the defendants, MELVIN KAMINS and SANDY SCHRAGO, would and did send Richard Allen Torch to Pittsburgh, Pennsylvania, for the purpose of assisting the defendant, GREGORY KOCAN, manager of the Majestic News Company, in transporting in interstate commerce, for the purpose of sale and distribution, obscene, lewd, lascivious, and filthy magazines and motion picture films.

It was further a part of the conspiracy that the defendant, GREGORY KOCAN, would instruct Richard Allen Torch to purchase a vehicle for the purpose of transporting

obscene, lewd, lascivious, and filthy magazines and motion picture films from the Western District of Pennsylvania to the state of West Virginia and elsewhere.

It was further a part of the conspiracy that the defendant, RICHARD JENKINS, would periodically provide Richard Allen Torch with 8 millimeter and super 8 millimeter motion picture films, which films were to be transported in interstate commerce for the purpose of sale and distribution.

It was further a part of the conspiracy that the word "tapes" would be used by said conspirators on sales receipts and sales reports when referring to 8 millimeter and super 8 millimeter motion picture films.

It was further a part of the conspiracy that the defendant JAMES CALDERONE, would introduce Richard Allen Torch to prospective purchasers or distributors of obscene, lewd,

lascivious, and filthy magazines and motion picture films.

It was further a part of the conspiracy that Richard Allen Torch would prepare a weekly sales report and provide the defendants, SANDY SCHRAGO and GREGORY KOCAN, with a copy of said report.

It was further a part of the conspiracy that Phyllis Johns would periodically forward to MELVIN KAMINS copies of sales receipts, which receipts would reflect sales made by Richard Allen Torch of 8 millimeter and super 8 millimeter motion picture films, magazines, and other merchandise to customers in West Virginia and elsewhere.

It was further a part of the conspiracy that co-conspirator Phyllis John would periodically forward checks drawn on the account of the Majestic News Company to both Western Reserve Enterprises, Ltd. and the Sovereign News Company located at 2075

East 65th Street, Cleveland, Ohio.

An object of the aforesaid combination, conspiracy, confederation, agreement and plan was to profit financially the defendants and others by the interstate shipment and sale of obscene, lewd, lascivious, and filthy magazines and motion picture films.

Overt Acts

The grand jury charges that in furtherance of the aforesaid conspiracy and in order to accomplish the objects thereof, the defendants and co-conspirators, at the times and places hereinafter set forth, did commit, among others, the following Overt Acts:

1. That on or about March 18, 1975, the defendant, SANDY SCHRAGO, caused a memorandum to be forwarded to the defendant, GREGORY KOCAN, at the Majestic News Company in Pittsburgh, Pennsylvania.

2. That on or about August 26, 1975, the defendant, SANDY SCHRAGO, caused a memorandum to be forwarded to the defendant, GREGORY KOCAN, at the Majestic News Company in Pittsburgh, Pennsylvania.

3. That on or about May 21, 1976, the defendant SANDY SCHRAGO, caused a memorandum to be forwarded to the defendant, GREOGRY KOCAN, at the Majestic News Company in Pittsburgh, Pennsylvania, and caused a copy of said memorandum to be sent to the defendants, REUBEN STURMAN and MELVIN KAMINS.

4. That on or about May 21, 1976, the defendant, SANDY SCHRAGO, sent a memorandum to the defendant, GREGORY KOCAN, at the Majestic News Company in Pittsburgh, Pennsylvania, setting forth certain abbreviations to be utilized in billing merchandise.

5. That during September of 1976, the defendant, SANDY SCHRAGO, instructed Richard Allen Torch to travel to

Pittsburgh, Pennsylvania.

6. That on or about September 8, 1976, the defendant, MELVIN KAMINS, forwarded a letter to the defendant, GREGORY KOCAN.

7. That on or about September 13, 1976, the co-conspirator, Richard Allen Torch, purchased a vehicle, upon the instructions of the defendant, GREGORY KOCAN.

8. That on or about October 5, 1976, the defendant, JAMES CALDERONE, traveled to West Virginia with co-conspirator Richard Allen Torch.

9. That on or about January 12, 1977, the defendant, RICHARD JENKINS, provided to co-conspirator, Richard Allen Torch, motion picture film containers entitled "Lolita Movies - Children Love, Susie and her Little Brother."

10. That from on or about October 1, 1976, until July 18, 1977, co-conspirator, Richard Allen Torch, would prepare a sales report and provide a copy to defendants,

SANDY SCHRAGO and GREGORY KOCAN, on a weekly basis.

11. That throughout the course of the conspiracy, co-conspirator, Phyllis Johns, would forward to the defendant, MELVIN KAMINS, on a weekly basis, copies of sales receipts.

12. That on December 18, 1976, a meeting was held between defendants, GREGORY KOCAN, RICHARD JENKINS, JAMES CALDERONE, and co-conspirator, Richard Allen Torch.

13. That on or about February 16, 1977, the defendant, RICHARD JENKINS, caused to be prepared for shipment to the Market Street News, Wheeling, West Virginia, a package containing six obscene, lewd, lascivious, and filthy motion picture films entitled "Horse #800", "Horse #801", "Horse #802", "Horse #803", "Horse #804", and "Horse #805".

14. That on or about February 1, 1977, the co-conspirator, Richard Allen Torch, transported in interstate commerce for the purpose of sale and distribution from Pittsburgh, Pennsylvania, to Charleston, West Virginia, the following obscene, lewd, lascivious, and filthy motion picture films: "Jade No. 6", and "Danish Films #1011 Outdoor Girl".

15. That on or about February 15, 1977, the co-conspirator, Richard Allen Torch, transported in interstate commerce for the purpose of sale and distribution from Pittsburgh, Pennsylvania, to Charleston, West Virginia, the following obscene, lewd, lascivious, and filthy motion picture films: "Flying O Pussy - The Wild Cats", "Both Ways - Social Worker, B-105", "Embrace No. 1", "Embrace No. 2", "Embrace No. 3", Embrace No. 4", "Embrace No. 5", and "Gypsy Films - No. 4 Sweet Meat".

16. That the defendants named in Counts Two through Sixteen of this indictment caused to be done the acts set forth in Counts Two through Sixteen on the dates, at the places and in the manner therein set forth, each of which is incorporated herein by reference as through fully set forth and made a part of this count as separate and individual Overt Acts done in furtherance of the conspiracy.

In violation of Title 18, United States Code, Section 371.

COUNT TWO

The grand jury further charges:

That on or about the 23rd day of November, 1976, at Pittsburgh, in the County of Allegheny, in the Western District of Pennsylvania, the defendants, REUBEN STURMAN, MELVIN KAMINS, GREGORY KOCAN, SANDY SCHRAGO and RICHARD JENKINS, did knowingly transport in interstate commerce for the prupose of sale and distribution, and did knowingly cause, counsel, induce, aid and abet each other and one Richard Allen Torch, not named as a defendant herein, to knowingly transport in interstate commerce, for the purpose of sale and distribution, from Pittsburgh, Pennsylvania, to Charleston, West Virginia, an obscene, lewd, lascivious, and filthy motion picture film entitled "Swedish Erotica #62 - China Doll".

In violation of Title 18, United States Code, Sections 1465 and 2.

COUNT THREE

The grand jury further charges:

That on or about the 12th day of January, 1977, at Pittsburgh, in the County of Allegheny, in the Western District of Pennsylvania, the defendants, REUBEN STURMAN, MELVIN KAMINS, GREGORY KOCAN, SANDY SCHRAGO and RICHARD JENKINS, did knowingly transport and cause to be transported in interstate commerce for the purpose of sale and distribution, and did knowingly cause, counsel, induce, aid and abet each other and one Richard Allen Torch, not named as a defendant herein, to knowingly transport in interstate commerce, for the purpose of sale and distribution, from Pittsburgh, Pennsylvania, to Elkins, West Virginia, an obscene, lewd, lascivious, and filthy motion picture film container bearing pictures and writing thereon entitled "Lolita Movies - Children Love-Susie and her Little Brother".

In violation of Title 18, United States Code, Sections 1465 and 2.

COUNT FOUR

The grand jury further charges:

That on or about the 1st day of February, 1977, at Pittsburgh, in the County of Allegheny, in the Western District of Pennsylvania, the defendants, REUBEN STURMAN, MELVIN KAMINS, GREGORY KOCAN, SANDY SCHRAGO and RICHARD JENKINS, did knowingly transport in interstate commerce for the purpose of sale and distribution, and did knowingly cause, counsel, induce, aid and abet each other and one Richard Allen Torch, not named as a defendant herein, to knowingly transport in interstate commerce, for the purpose of sale and distribution, from Pittsburgh, Pennsylvania, to Charleston, West Virginia, an obscene, lewd, lascivious, and filthy motion picture film entitled "Swedish Erotica #70 - Black in White".

In violation of Title 18, United States Code, Sections 1465 and 2.

COUNT FIVE

The grand jury further charges:

That on or about the 9th day of February, 1977, at Pittsburgh, in the County of Allegheny, in the Western District of Pennsylvania, the defendants, REUBEN STURMAN, MELVIN KAMINS, GREGORY KOCAN, SANDY SCHRAGO and RICHARD JENKINS, did knowingly transport and cause to be transported in interstate commerce for the purpose of sale and distribution, and did knowingly cause, counsel, induce, aid and abet each other and one Richard Allen Torch, not named as a defendant herein, to knowingly transport in interstate commerce, for the purpose of sale and distribution, from Pittsburgh, Pennsylvania, to Elkins, West Virginia, an obscene, lewd, lascivious and filthy motion picture film entitled "Linda Lovelace in Dog Fucker".

In violation of Title 18, United States Code, Sections 1465 and 2.

COUNT SIX

The grand jury further charges:

That on or about the 15th day of February, 1977, at Pittsburgh, in the County of Allegheny, in the Western District of Pennsylvania, the defendants, REUBEN STURMAN, MELVIN KAMINS, GREGORY KOCAN, SANDY SCHRAGO and RICHARD JENKINS, did knowingly transport in interstate commerce for the purpose of sale and distribution, and did knowingly cause, counsel, induce, aid and abet each other and one Richard Allen Torch, not named as a defendant herein, to knowingly transport in interstate commerce, for the purpose of sale and distribution, from Pittsburgh, Pennsylvania, to Charleston, West Virginia, an obscene, lewd, lascivious, and filthy motion picture film entitled "Linda Lovelace in Dog Fucker".

In violation of Title 18, United States Code, Sections 1465 and 2.

COUNT SEVEN

The grand jury further charges:

That on or about the 15th day of February, 1977, at Pittsburgh, in the County of Allegheny, in the Western District of Pennsylvania, the defendants, REUBEN STURMAN, MELVIN KAMINS, GREGORY KOCAN, SANDY SCHRAGO and RICHARD JENKINS, did knowingly transport in interstate commerce for the purpose of sale and distribution, and did knowingly cause, counsel, induce, aid and abet each other and one Richard Allen Torch, not named as a defendant herein, to knowingly transport in interstate commerce, for the purpose of sale and distribution, from Pittsburgh, Pennsylvania, to Charleston, West Virginia, an obscene, lewd, lascivious, and filthy motion picture film entitled "Paragon - Hump the Hot Dog No. 5".

In violation of Title 18, United States Code, Sections 1465 and 2.

COUNT EIGHT

The grand jury further charges:

That on or about the 15th day of February, 1977, at Pittsburgh, in the County of Allegheny, in the Western District of Pennsylvania, the defendants, REUBEN STURMAN, MELVIN KAMINS, GREGORY KOCAN, SANDY SCHRAGO and RICHARD JENKINS, did knowingly transport in interstate commerce for the purpose of sale and distribution, and did knowingly cause, counsel, induce, aid and abet each other and one Richard Allen Torch, not named as a defendant herein, to knowingly transport in interstate commerce, for the purpose of sale and distribution, from Pittsburgh, Pennsylvania, to Charleston, West Virginia, an obscene, lewd, lascivious, and filthy motion picture film entitled "Both Ways - Anything Goes B-103".

In violation of Title 18, United States Code, Sections 1465 and 2.

COUNT NINE

The grand jury further charges:

That on or about the 15th day of February, 1977, at Pittsburgh, in the County of Allegheny, in the Western District of Pennsylvania, the defendants, REUBEN STURMAN, MELVIN KAMINS, GREGORY KOCAN, SANDY SCHRAGO and RICHARD JENKINS, did knowingly transport in interstate commerce for the purpose of sale and distribution, and did knowingly cause, counsel, induce, aid and abet each other and one Richard Allen Torch, not named as a defendant herein, to knowingly transport in interstate commerce, for the purpose of sale and distribution, from Pittsburgh, Pennsylvania, to Charleston, West Virginia, an obscene, lewd, lascivious, and filthy motion picture film entitled "Classex No. 1 - Swing Your Partner".

In violation of Title 18, United States Code, Sections 1465 and 2.

COUNT TEN

The grand jury further charges:

That on or about the 15th day of February, 1977, at Pittsburgh, in the County of Allegheny, in the Western District of Pennsylvania, the defendants, REUBEN STURMAN, MELVIN KAMINS, GREGORY KOCAN, SANDY SCHRAGO and RICHARD JENKINS, did knowingly transport in interstate commerce for the purpose of sale and distribution, and did knowingly cause, counsel, induce, aid and abet each other and one Richard Allen Torch, not named as a defendant herein, to knowingly transport in interstate commerce for the purpose of sale and distribution, from Pittsburgh, Pennsylvania, to Charleston, West Virginia, an obscene, lewd, lascivious, and filthy motion picture film entitled "O-Men of Sex, The Sex Artist".

In violation of Title 18, United States Code, Sections 1465 and 2.

COUNT ELEVEN

The grand jury further charges:

That on or about the 15th day of February, 1977, at Pittsburgh, in the County of Allegheny, in the Western District of Pennsylvania, the defendants, REUBEN STURMAN, MELVIN KAMINS, GREGORY KOCAN, SANDY SCHRAGO and RICHARD JENKINS, did knowingly transport in interstate commerce for the purpose of sale and distribution, and did knowingly cause, counsel, induce, aid and abet each other and one Richard Allen Torch, not named as a defendant herein, to knowingly transport in interstate commerce, for the purpose of sale and distribution, from Pittsburgh, Pennsylvania, to Charleston, West Virginia, an obscene, lewd, lascivious, and filthy motion picture film entitled "Classex No. 2, One Girl Orgy".

In violation of Title 18, United States Code, Sections 1465 and 2.

COUNT TWELVE

The grand jury further charges:

That on or about the 15th day of February, 1977, at Pittsburgh, in the County of Allegheny, in the Western District of Pennsylvania, the defendants, REUBEN STURMAN, MELVIN KAMINS, GREGORY KOCAN, SANDY SCHRAGO and RICHARD JENKINS, did knowingly transport in interstate commerce for the purpose of sale and distribution, and did knowingly cause, counsel, induce, aid and abet each other and one Richard Allen Torch, not named as a defendant herein, to knowingly transport in interstate commerce for the purpose of sale and distribution, from Pittsburgh, Pennsylvania, to Charleston, West Virginia, an obscene, lewd, lascivious, and filthy motion picture film entitled "O-Men of Sex, Secretary Sex".

In violation of Title 18, United States Code, Sections 1465 and 2.

COUNT THIRTEEN

The grand jury further charges:

That on or about the 15th day of February, 1977, at Pittsburgh, in the County of Allegheny, in the Western District of Pennsylvania, the defendants, REUBEN STURMAN, MELVIN KAMINS, GREGORY KOCAN, SANDY SCHRAGO and RICHARD JENKINS, did knowingly transport in interstate commerce for the purpose of sale and distribution, and did knowingly cause, counsel, induce, aid and abet each other and one Richard Allen Torch, not named as a defendant herein, to knowingly transport in interstate commerce, for the purpose of sale and distribution, from Pittsburgh, Pennsylvania, to Charleston, West Virginia, an obscene, lewd, lascivious, and filthy motion picture film entitled "Flying O Pussy - Savage Sex".

In violation of Title 18, United States Code, Sections 1465 and 2.

COUNT FOURTEEN

The grand jury further charges:

That on or about the 15th day of February, 1977, at Pittsburgh, in the County of Allegheny, in the Western District of Pennsylvania, the defendants, REUBEN STURMAN, MELVIN KAMINS, GREGORY KOCAN, SANDY SCHRAGO and RICHARD JENKINS, did knowingly transport in interstate commerce for the purpose of sale and distribution, and did knowingly cause, counsel, induce, aid and abet each other and one Richard Allen Torch, not named as a defendant herein, to knowingly transport in interstate commerce, for the purpose of sale and distribution, from Pittsburgh, Pennsylvania, to Charleston, West Virginia, an obscene, lewd, lascivious, and filthy motion picture film entitled "Both Ways - A Hole in Place".

In violation of Title 18, United States Code, Sections 1465 and 2.

COUNT FIFTEEN

The grand jury further charges:

That between on or about the 8th day of October, 1976, and the 16th day of February, 1977, at Pittsburgh, in the County of Allegheny, in the Western District of Pennsylvania, the defendants, REUBEN STURMAN, MELVIN KAMINS, GREGORY KOCAN, SANDY SCHRAGO and RICHARD JENKINS, did knowingly transport in interstate commerce for the purpose of sale and distribution, and did knowingly cause, counsel, induce, aid and abet each other and one Richard Allen Torch, not named as a defendant herein, to knowingly transport in interstate commerce, for the purpose of sale and distribution, from Pittsburgh, Pennsylvania, to Ripley, West Virginia, an obscene, lewd, lascivious, and filthy motion picture film entitled "Mother Truckers; MT-1, Check Your Oil Ma'am".

In violation of Title 18, United States Code, Sections 1465 and 2.

COUNT SIXTEEN

The grand jury further charges:

That on or about the 15th day of February, 1977, at Pittsburgh, in the County of Allegheny, in the Western District of Pennsylvania, the defendants, REUBEN STURMAN, MELVIN KAMINS, GREGORY KOCAN, SANDY SCHRAGO and RICHARD JENKINS, did knowingly transport in interstate commerce for the purpose of sale and distribution, and did knowingly cause, counsel, induce, aid and abet each other and one Richard Allen Torch, not named as a defendant herein, to knowingly transport in interstate commerce for the purpose of sale and distribution, from Pittsburgh, Pennsylvania, to Charleston, West Virginia, an obscene, lewd, lascivious, and filthy book, pamphlet and matter, more particularly described as a magazine titled "More Lollitots, Vol. 4, No. 9".

In violation of Title 18, United States Code, Sections 1465 and 2.

A True Bill,

_____
Foreman

_____
ROBERT J. CINDRICH
United States Attorney

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

UNITED STATES OF AMERICA,	)	
Plaintiff,	)	Criminal No. Cr 76 124
v.	)	Violations: T.18, U.S.C., §§ 1461, 1462, 1465, 371 & 2
REUBEN STURMAN; MELVIN KAMINS; JOSEPH ZERNIC; ANTOINE DOSTAL; FRED HIRSCH; SAMUEL JOSEPH; RICHARD JOHNSON; SOVEREIGN NEWS COMPANY,	)	
Defendants.	)	

INDICTMENT

The Grand Jury charges:

COUNT I

From in or about September, 1973, and continuously thereafter up to and including the date of the filing of this indictment, defendants, REUBEN STURMAN, MELVIN KAMINS, JOSEPH ZERNIC, ANTOINE

DOSTAL, FRED HIRSCH, SAMUEL JOSEPH, RICHARD JOHNSON and the SOVEREIGN NEWS COMPANY, did in the Northern District of Ohio, Eastern Division and elsewhere willfully and knowingly conspire, combine, collaborate and agree together and with each other and with diverse other persons whose names are to the Grand Jury unknown to commit offenses against the United States, to wit, to knowingly use the Untied States mails for the mailing, carriage in the mails, and delivery of obscene, lewd, lascivious and filthy magazines and motion picture films in violation of Sections 1461 & 2, Title 18, United States Code and to knowingly use and cause to be used common carriers for carriage in interstate commerce of obscene, lewd, lascivious and filthy magazines and motion picture films in violation of Sections 1462 & 2, Title 18, United States Code, and to knowingly

transport and cause to be transported in interstate commerce for the purpose of sale and distribution obscene, lewd, lascivious and filthy magazines and motion picture films in violation of Sections 1465 & 2, Title 18, United States Code, all in violation of Section 371, Title 18, United States Code.

It was a part of the said conspiracy that the Defendants would knowingly use the United States mails, express companies and other common carriers for carriage, in interstate and foreign commerce, and knowingly taking from such express companies and other common carriers obscene, lewd, lascivious and filthy magazines and motion picture films.

An object of said combination, conspiracy, confederation, agreement and plan was to profit financially the defendants and others by the interstate

shipment and sale of obscene, lewd, lascivious and filthy magazines and motion picture films.

At the times hereinafter mentioned, the following overt acts were engaged in to further and affect the objectives of said combination, conspiracy, confederation, agreement and plan:

1. On or about February 12, 1975, in Cleveland, Ohio, defendant SAMUEL JOSEPH accepted a telephone order as, sales agent for the Sovereign News Company, Cleveland, Ohio, from the operator of Webster Book Store, Fort Worth, Texas for the sale of eight obscene, lewd, lascivious and filthy motion picture films.

2. On or about February 18, 1975, in Cleveland, Ohio, defendant SOVEREIGN NEWS COMPANY acting by and through SAMUEL JOSEPH, REUBEN STURMAN, MELVIN KAMINS, JOSEPH ZERNIC, ANTOINE DOSTAL, FRED HIRSCH, and RICHARD JOHNSON and other unknown

employees caused eight obscene, lewd, lascivious and filthy motion picture films to be mailed, from Cleveland, Ohio to Webster Book Store, Fort Worth, Texas, and was thereinafter received by the operator of said Webster Book Store.

3. On or about February 20, 1975, in Cleveland, Ohio defendant SAMUEL JOSEPH, accepted a telephone order as sales agent for the Sovereign News Company from the operator of Webster Book Store, Fort Worth, Texas for the sale of three obscene, lewd, lascivious and filthy motion picture films, and twenty-seven obscene, lewd, lascivious and filthy magazines.

4. On or about February 28, 1975, in Cleveland, Ohio the defendant SOVEREIGN NEWS COMPANY acting by and through defendants SAMUEL JOSEPH, REUBEN STURMAN, MELVIN KAMINS, JOESPH ZERNIC, ANTOINE DOSTAL, FRED HIRSCH, RICHARD JOHNSON and

others unknown to the Grand Jury caused three obscene, lewd, lascivious and filthy motion picture films, and twenty seven obscene, lewd, lascivious and filthy magazines to be mailed from Cleveland, Ohio to Webster Book Store, Fort Worth, Texas and was thereinafter received by the operator of said Webster Book Store.

5. On or about March 3, 1975, in Cleveland, Ohio defendant SAMUEL JOSEPH, as sales agent for the Sovereign News Company, Cleveland, Ohio, accepted a telephone order from the operator of the Webster Book Store, Fort Worth, Texas, from the sale of fifty-four obscene, lewd, lascivious and filthy magazines.

6. On or about March 4, 1975, in Cleveland, Ohio, defendant SOVEREIGN NEWS COMPANY acting by and through defendants SAMUEL JOSEPH, REUBEN STURMAN, MELVIN KAMINS, JOSEPH ZERNIC, ANTOINE DOSTAL,

FRED HIRSCH, RICHARD JOHNSON and others unknown to the Grand Jury caused fifty-four obscene, lewd, lascivious and filthy magazines to be transported by use of a common carrier, United Parcel Service, from Cleveland, Ohio to Webster Book Store, Fort Worth, Texas and was thereinafter received by the operator of said Webster Book Store.

7. On or about February 26, 1975, in Cleveland, Ohio defendant SOVEREIGN NEWS COMPANY acting by and through defendants SAMUEL JOSEPH, REUBEN STURMAN, MELVIN KAMINS, JOSEPH ZERNIC, ANTOINE DOSTAL, FRED HIRSCH, RICHARD JOHNSON and others unknown to the Grand Jury caused a Sovereign News Company invoice number 33544 to be mailed from Cleveland, Ohio to Webster Book Store, Fort Worth, Texas for the purchase of three obscene, lewd, lascivious and filthy motion picture films and twenty-seven obscene, lewd, lascivious

and filthy magazines mentioned in paragraph three above.

8. On or about March 4, 1975, in Cleveland, Ohio defendant SOVEREIGN NEWS COMPANY acting by and through defendants SAMUEL JOSEPH, REUBEN STURMAN, MELVIN KAMINS, JOSEPH ZERNIC, ANTOINE DOSTAL, FRED HIRSCH, RICHARD JOHNSON and others unknown to the Grand Jury caused a letter containing Sovereign News Company invoice number 16704 to be mailed from Cleveland, Ohio to Webster Book Store, Fort Worth, Texas for the purchase of fifty-four obscene, lewd, lascivious and filthy magazines mentioned in paragraph six above.

All in violation of Title 18, United States Code, Section 371.

The Grand Jury further charges:

COUNT II

On or about February 12, 1975, in Cleveland, Ohio, within the Northern District of Ohio, Defendants REUBEN

STURMAN, MELVIN KAMINS, ANTOINE DOSTAL, FRED HIRSCH, SAMUEL JOSEPH, RICHARD JOHNSON and the SOVEREIGN NEWS COMPANY, 2075 East 65th Street, Cleveland, Ohio, did knowingly use and cause, counsel, induce, command, aid and abet each other in the use of mails for the mailing, on or about February 18, 1975, and carriage in the mails of a parcel containing a certain obscene, lewd, lascivious, indecent, filthy and vile motion picture film entitled, Tour Eiffel, from Cleveland, Ohio to the Webster Book Store, 3522 Hemphill Street, Fort Worth, Texas, and did knowingly cause to be delivered by mail to the directions thereon, said parcel and its contents, all in violation of Sections 1461 and 2, Title 18, United States Code.

The Grand Jury further charges:

COUNT III

On or about February 12, 1975, in

Cleveland, Ohio, within the Northern District of Ohio, Defendants REUBEN STURMAN, MELVIN KAMINS, ANTOINE DOSTAL, FRED HIRSCH, SAMUEL JOSEPH, RICHARD JOHNSON and THE SOVEREIGN NEWS COMPANY, 2075 East 65th Street, Cleveland, Ohio, did knowingly use and cause, counsel, induce, command, aid and abet each other in the use of the mails for the mailing, on or about February 18, 1975, and carriage in the mails of a parcel containing a certain obscene, lewd, lascivious, indecent, filthy and vile motion picture film entitled, Grand Prix, from Cleveland, Ohio to the Webster Book Store, 3522 Hemphill Street, Fort Worth, Texas, and did knowingly cause to be delivered by mail to the directions thereon, said parcel and its contents, all in violation of Sections 1461 and 2, Title 18, United States Code.

The Grand Jury further charges:

COUNT IV

On or about February 12, 1975, in Cleveland, Ohio, within the Northern District of Ohio, Defendants REUBEN STURMAN, MELVIN KAMINS, ANTOINE DOSTAL, FRED HIRSCH, SAMUEL JOSEPH, RICHARD JOHNSON, and THE SOVEREIGN NEWS COMPANY, 2075 East 65th Street, Cleveland, Ohio, did knowingly use and cuase, counsel, induce, command, aid and abet each other in the use of the mails for the mailing, on or about February 18, 1975, and carriage in the mails of a parcel containing a certain obscene, lewd, lascivious, indecent, filthy and vile motion picture film entitled, Cake Orgy, from Cleveland, Ohio to the Webster Book Store, 3522 Hemphill Street, Forth Worth, Texas, and did knowingly cause to be delivered by mail to the directions thereon, said parcel and its contents, all in violation of Sections 1461 and 2, Title

18, United States Code.

The Grand Jury further charges:

COUNT V

On or about February 12, 1975, in Cleveland, Ohio, within the Northern District of Ohio, Defendants REUBEN STURMAN, MELVIN KAMINS, ANTOINE DOSTAL, FRED HIRSCH, SAMUEL JOSEPH, RICHARD JOHNSON and the SOVEREIGN NEWS COMPANY, 2075 East 65th Street, Cleveland, Ohio, did knowingly use and cause, counsel, induce, command, aid and abet each other in the use of the mails for the mailing, on or about February 18, 1975, and carriage in the mails of a parcel containing a certain obscene, lewd, lascivious, indecent, filthy and vile motion picture film entitled, Funny Priest, from Cleveland, Ohio to the Webster Book Store, 3522 Hemphill Street, Fort Worth, Texas, and did knowingly cause to be delivered by mail to the directions

thereon, said parcel and its contents, all in violation of Sections 1461 and 2, Title 18, United States Code.

The Grand Jury further charges:

COUNT VI

On or about February 12, 1975, in Cleveland, Ohio, within the Northern District of Ohio, Defendants REUBEN STURMAN, MELVIN KAMINS, ANTOINE DOSTAL, FRED HIRSCH, SAMUEL JOSEPH, RICHARD JOHNSON and the SOVEREIGN NEWS COMPANY, 2075 East 65th Street, Cleveland, Ohio, did knowingly use and cause, counsel, induce, command, aid and abet each other in the use of the mails for the mailing, on or about February 18, 1975, and carriage in the mails of a parcel containing a certain obscene, lewd, lascivous, indecent, filthy and vile motion picture film entitled, Psycho Doll, from Cleveland, Ohio to the Webster Book Store, 3522 Hemphill Street, Fort Worth, Texas, and did knowingly cause to

be delivered by mail to the directions thereon, said parcel and its contents, all in violation of Sections 1461 and 2, Title 18, United States Code.

The Grand Jury further charges:

COUNT VII

On or about February 12, 1975, in Cleveland, Ohio, within the Northern District of Ohio, Defendants REUBEN STURMAN, MELVIN KAMINS, ANTOINE DOSTAL, FRED HIRSCH, SAMUEL JOSEPH, RICHARD JOHNSON and the SOVEREIGN NEWS COMPANY, 2075 East 65th Street, Cleveland, Ohio, did knowingly use and cause, counsel, induce, command, aid and abet each other in the use of the mails for the mailing, on or about February 18, 1975, and carriage in the mails of a parcel containing a certain obscene, lewd, lascivious, indecent, filthy and vile motion picture film entitled, Hot Sucker, from Cleveland, Ohio to the Webster Book Store, 3522 Hemphill Street, Fort Worth, Texas, and did knowingly cause

to be delivered by mail to the directions thereon, said parcel and its contents, all in violation of Sections 1461 and 2, Title 18, United States Code.

The Grand Jury further charges:

COUNT VIII

On or about February 12, 1975, in Cleveland, Ohio, within the Northern District of Ohio, Defendants REUBEN STURMAN, MELVIN KAMINS, ANTOINE DOSTAL, FRED HIRSCH, SAMUEL JOSEPH, RICHARD JOHNSON and the SOVEREIGN NEWS COMPANY, 2075 East 65th Street, Cleveland, Ohio, did knowingly use and cause, counsel, induce, command, aid and abet each other in the use of the mails for the mailing, on or about February 18, 1975, and carriage in the mails of a parcel containing a certain obscene, lewd, lascivious, indecent, filthy and vile motion picture film entitled, Horse Play, from Cleveland, Ohio to the Webster Book

Store, 3522 Hemphill Street, Fort Worth, Texas, and did knowingly cause to be delivered by mail to the directions thereon, said parcel and its contents, all in violation of Sections 1461 and 2, Title 18, United States Code.

The Grand Jury further charges:

COUNT IX

On or about February 12, 1975, in Cleveland, Ohio, within the Northern District of Ohio, Defendants REUBEN STURMAN, MELVIN KAMINS, ANTOINE DOSTAL, FRED HIRSCH, SAMUEL JOSEPH, RICHARD JOHNSON and THE SOVEREIGN NEWS COMPANY, 2075 East 65th Street, Cleveland, Ohio, did knowingly use and cause, counsel, induce, command, aid and abet each other in the use of the mails for the mailing, on or about February 18, 1975, and carriage in the mails of a parcel containing a certain obscene, lewd, lascivious, indecent, filthy and vile motion picture film entitled, Jam It In, from

Cleveland, Ohio to the Webster Book Store, 3522 Hemphill Street, Fort Worth, Texas, and did knowingly cause to be delivered by mail to the directions thereon, said parcel and its contents, all in violation of Sections 1461 and 2, Title 18, United States Code.

The Grand Jury further charges:

COUNT X

On or about February 20, 1975, in Cleveland, Ohio, within the Northern District of Ohio, Defendants REUBEN STURMAN, MELVIN KAMINS, ANTOINE DOSTAL, FRED HIRSCH, SAMUEL JOSEPH, RICHARD JOHNSON and THE SOVEREIGN NEWS COMPANY, 2075 East 65th Street, Cleveland, Ohio, did knowingly use and cause, counsel, induce, command, aid and abet each other in the use of the mails for the mailing, on or about February 25, 1975, and carriage in the mails of a parcel containing a

certain obscene, lewd, lascivious, indecent, filthy and vile motion picture film entitled, White Fantasies, from Cleveland, Ohio, to the Webster Book Store, 3522 Hemphill Street, Fort Worth, Texas, and did knowingly cause to be delivered by mail to the directions thereon, said parcel and its contents, all in violation of Sections 1461 and 2, Title 18, United States Code.

The Grand Jury further charges:

COUNT XI

On or about February 20, 1975, in Cleveland, Ohio, within the Northern District of Ohio, Defendants REUBEN STURMAN, MELVIN KAMINS, JOSEPH ZERNIC, ANTOINE DOSTAL, SAMUEL JOSEPH, RICHARD JOHNSON and THE SOVEREIGN NEWS COMPANY, 2075 East 65th Street, Cleveland, Ohio, did knowingly use and cause, counsel, induce, command, aid and abet each other in the use of the mails for the mailing,

on or about February 25, 1975, and carriage in the mails of a parcel containing a certain obscene, lewd, lascivious, indecent, filthy and vile magazine entitled, The Sex Family, from Cleveland, Ohio, to the Webster Book Store, 3522 Hemphill Street, Fort Worth, Texas, and did knowingly cause to be delivered by mail to the directions thereon, said parcel and its contents, all in violation of Sections 1461 and 2, Title 18, United States Code.

The Grand Jury further charges:

COUNT XII

On or about February 20, 1975, in Cleveland, Ohio, within the Northern District of Ohio, Defendants REUBEN STURMAN, MELVIN KAMINS, JOSEPH ZERNIC, ANTOINE DOSTAL, SAMUEL JOSEPH, RICHARD JOHNSON and THE SOVEREIGN NEWS COMPANY, 2057 East 65th Street, Cleveland, Ohio, did knowingly use and cause, counsel,

induce, command, aid and abet each other in the use of the mails for the mailing, on or about February 25, 1975, and carriage in the mails of a parcel containing a obscene, lewd, lascivious, indecent, filthy and vile magazine entitled, Sexploration Vol. I, Group Sex, from Cleveland, Ohio, to the Webster Book Store, 3522 Hemphill Street, Fort Worth, Texas, and did knowingly cause to be delivered by mail to the directions thereon, said parcel and its contents, all in violation of Sections 1461 and 2, Title 18, United States Code.

The Grand Jury further charges:

COUNT XIII

On or about February 20, 1975, in Cleveland, Ohio, within the Northern District of Ohio, Defendants REUBEN STURMAN, MELVIN KAMINS, JOSEPH ZERNIC, ANTOINE DOSTAL, SAMUEL JOSEPH, RICHARD JOHNSON and THE SOVEREIGN NEWS COMPANY,

2075 East 65th Street, Cleveland, Ohio, did knowingly use and cause, counsel, induce, command, aid and abet each other in the use of the mails for the mailing, on or about February 25, 1975, and carriage in the mails of a parcel containing a certain obscene, lewd, lascivious, indecent, filthy and vile magazine entitled, Sexploration Vol. II, Group Sex, from Cleveland, Ohio to the Webster Book Store, 3522 Hemphill Street, Forth Worth, Texas, and did knowingly cause to be delivered by mail to the directions thereon, said parcel and its contents, all in violation of Sections 1461 and 2, Title 18, United States Code.

The Grand Jury further charges:

COUNT XIV

On or about February 20, 1975, in Cleveland, Ohio, within the Northern District of Ohio, Defendants REUBEN

STURMAN, MELVIN KAMINS, JOSEPH ZERNIC, ANTOINE DOSTAL, SAMUEL JOSEPH, RICHARD JOHNSON and THE SOVEREIGN NEWS COMPANY, 2075 East 65th Street, Cleveland, Ohio, did knowingly use and cause, counsel, induce, command, aid and abet each other in the use of the mails for the mailing, on or about February 25, 1975, and carriage in the mails of a parcel containing a certain obscene, lewd, lascivious, indecent, filthy and vile magazine entitled, Positions and Techniques, from Cleveland, Ohio, to the Webster Book Store, 3522 Hemphill Street, Fort Worth, Texas, and did knowingly cause to be delivered by mail to the directions thereon, said parcel and its contents, all in violation of Sections 1461 and 2, Title 18, United States Code.

The Grand Jury further charges:

COUNT XV

On or about February 20, 1975, in Cleveland, Ohio, within the Northern District of Ohio, Defendants REUBEN STURMAN, MELVIN KAMINS, JOSEPH ZERNIC, ANTOINE DOSTAL, SAMUEL JOSEPH, RICHARD JOHNSON and THE SOVEREIGN NEWS COMPANY, 2075 East 65th Street, Cleveland, Ohio, did knowingly use and cause, counsel, induce, command, aid and abet each other in the use of the mails for the mailing, on or about February 25, 1975, and carriage in the mails of a parcel containing a certain obscene, lewd, lascivious, indecent, filthy and vile magazine entitled, Sexual Arousal: Oral Sex, from Cleveland, Ohio, to the Webster Book Store, 3522 Hemphill Street, Fort Worth, Texas, and did knowingly cause to be delivered by mail to the directions thereon, said parcel and its contents, all in violation of Sections 1461 and 2, Title 18, United

States Code.

The Grand Jury further charges:

COUNT XVI

On or about February 20, 1975, in Cleveland, Ohio, within the Northern District of Ohio, Defendants REUBEN STURMAN, MELVIN KAMINS, JOSEPH ZERNIC, ANTOINE DOSTAL, SAMUEL JOSEPH, RICHARD JOHNSON and THE SOVEREIGN NEWS COMPANY, 2075 East 65th Street, Cleveland, Ohio, did knowingly use and cause, counsel, induce, command, aid and abet each other in the use of the mails for the mailing, on or about February 25, 1975, and carriage in the mails of a parcel containing a certain obscene, lewd, lascivious, indecent, filthy and vile magazine entitled, Sucking, from Cleveland, Ohio, to the Webster Book Store, 3522 Hemphill Street, Fort Worth, Texas, and did knowingly cause to be delivered by mail to the

directions thereon, said parcel and its contents, all in violation of Sections 1461 and 2, Title 18, United States Code.

The Grand Jury further charges:

COUNT XVII

On or about February 20, 1975, in Cleveland, Ohio, within the Northern District of Ohio, Defendants REUBEN STURMAN, MELVIN KAMINS, JOSEPH ZERNIC, ANTOINE DOSTAL, SAMUEL JOSEPH, RICHARD JOHNSON and THE SOVEREIGN NEWS COMPANY, 2075 East 65th Street, Cleveland, Ohio, did knowingly use and cause, counsel, induce, command, aid and abet each other in the use of the mails for the mailing, on or about February 25, 1975, and carriage in the mails of a parcel containing a certain obscene, lewd, lascivious, indecent, filthy and vile magazine entitled, Sucking and Fucking, from Cleveland, Ohio, to the Webster Book Store, 3522 Hemphill Street, Fort

Worth, Texas, and did knowingly cause to be delivered by mail to the directions thereon, said parcel and its contents, all in violation of Sections 1461 and 2, Title 18, United States Code.

The Grand Jury further charges:

COUNT XVIII

On or about February 20, 1975, in Cleveland, Ohio, within the Northern District of Ohio, Defendants REUBEN STURMAN, MELVIN KAMINS, JOSEPH ZERNIC, ANTOINE DOSTAL, SAMUEL JOSEPH, RICHARD JOHNSON and THE SOVERIEGN NEWS COMPANY, 2075 EAST 65TH Street, Cleveland, Ohio, did knowingly use and cause, counsel, induce, command, aid and abet each other in the use of the mails for mailing, on or about February 25, 1975, and carriage in the mails of a parcel containing a certain obscene, lewd, lascivious, indecent, filthy and file magazine entitled, Fucking Trios, from Cleveland, Ohio, to the Webster

Book Store, 3522 Hemphill Street, Fort Worth, Texas, and did knowingly cause to be delivered by mail to the directions thereon, said parcel and its contents, all in violation of Sections 1461 and 2, Title 18, United States Code.

The Grand Jury further charges:

COUNT XIX

On or about February 20, 1975, in Cleveland, Ohio, within the Northern District of Ohio, Defendants REUBEN STURMAN, MELVIN KAMINS, JOSEPH ZERNIC, ANTOINE DOSTAL, SAMUEL JOSEPH, RICHARD JOHNSON and THE SOVEREIGN NEWS COMPANY, 2075 East 65th Street, Cleveland, Ohio, did knowingly use and cause, counsel, induce, command, aid and abet each other in the use of the mails for the mailing, on or about February 25, 1975, and carriage in the mails of a parcel containing a certain obscene, lewd, lascivious, indecent, filthy and vile magazine entitled,

Hot Cunts, from Cleveland, Ohio, to the Webster Book Store, 3522 Hemphill Street, Fort Worth, Texas, and did knowingly cause to be delivered by mail to the directions thereon, said parcel and its contents, all in violation of Sections 1461 and 2, Title 18, United States Code.

The Grand Jury further charges:

COUNT XX

On or about March 4, 1975, in Cleveland, Ohio, within the Northern District of Ohio, Defendants REUBEN STURMAN, MELVIN KAMINS, JOSEPH ZERNIC, ANTOINE DOSTAL, SAMUEL JOSEPH, RICHARD JOHNSON and THE SOVEREIGN NEWS COMPANY, 2075 East 65th Street, Cleveland, Ohio, did knowingly use and cause, counsel, induce, command, aid and abet each other in the use of a common carrier to wit, the United States Parcel Service for carriage in interstate commerce from the Sovereign News Company, Cleveland, Ohio, to the Webster Book Store,

Fort Worth, Texas, an obscene, lewd, lascivious and filthy magazine entitled, Fun-Loving Nympho, all in violation of Sections 1462 and 2, Title 18, United States Code.

The Grand Jury further charges:

COUNT XXI

On or about March 4, 1975, in Cleveland, Ohio, within the Northern District of Ohio, Defendants REUBEN STURMAN, MELVIN KAMINS, JOSEPH ZERNIC, ANTOINE DOSTAL, SAMUEL JOSEPH, RICHARD JOHNSON and THE SOVEREIGN NEWS COMPANY, 2075 East 65th Street, Cleveland, Ohio, did knowingly use and cause, counsel, induce, command, aid and abet each other in the use of a common carrier, to wit, the United States Parcel Service for carriage in interstate commerce from the Sovereign News Company, Cleveland, Ohio, to the Webster Book Store, Fort Worth, Texas, an obscene,

lewd, lascivious and filthy magazine entitled, Oral Love #215, all in violation of Sections 1462 and 2, Title 18, United States Code.

The Grand Jury further charges:

COUNT XXII

On or about March 4, 1975, in Cleveland, Ohio, within the Northern District of Ohio, Defendants REUBEN STURMAN, MELVIN KAMINS, JOSEPH ZERNIC, ANTOINE DOSTAL, SAMUEL JOSEPH, RICHARD JOHNSON and THE SOVEREIGN NEWS COMPANY, 2075 East 65th Street, Cleveland, Ohio, did knowingly use and cause, counsel, induce, command, aid and abet each other in the use of a common carrier, to wit, the United States Parcel Service for carriage in interstate commerce from the Sovereign News Company, Cleveland, Ohio, to the Webster Book Store, Fort Worth, Texas, an obscene, lewd, lascivious and filthy magazine

entitled, Sex Tech #218, all in violation of Sections 1462 and 2, Title 18, United States Code.

The Grand Jury further charges:

COUNT XXIII

On or about March 4, 1975, in Cleveland, Ohio, within the Northern District of Ohio, Defendants REUBEN STURMAN, MELVIN KAMINS, JOSEPH ZERNIC, ANTOINE DOSTAL, SAMUEL JOSEPH, RICHARD JOHNSON and THE SOVEREIGN NEWS COMPANY, 2075 East 65th Street, Cleveland, Ohio, did knowingly use and cause, counsel, induce, command, aid and abet each other in the use of a common carrier, to wit, the United States Parcel Service for carriage in inter-state commerce from the Sovereign News Company, Cleveland, Ohio, to the Webster Book Store, Fort Worth, Texas, an obscene, lewd, lascivious and filthy magazine entitled, Image #216, all in violation

of Sections 1462 and 2, Title 18, United States Code.

The Grand Jury further charges:

COUNT XXIV

On or about March 4, 1975, in Cleveland, Ohio, within the Northern District of Ohio, Defendants REUBEN STURMAN, MELVIN KAMINS, JOSEPH ZERNIC, ANTOINE DOSTAL, SAMUEL JOSEPH, RICHARD JOHNSON and THE SOVEREIGN NEWS COMPANY, 2075 East 65th Street, Cleveland, Ohio, did knowingly use and cause, counsel, induce, command, aid and abet each other in the use of a common carrier, to wit, the United States Parcel Service for carriage in interstate commerce from the Sovereign News Company, Cleveland, Ohio, to the Webster Book Store, Fort Worth, Texas, an obscene, lewd, lascivious and filthy magazine entitled, Eze Time #217, all in violation of Sections 1462 and 2, Title 18, United States Code.

The Grand Jury further charges:

COUNT XXV

On or about March 4, 1975, in Cleveland, Ohio, within the Northern District of Ohio, Defendants REUBEN STURMAN, MELVIN KAMINS, JOSEPH ZERNIC, ANTOINE DOSTAL, SAMUEL JOSEPH, RICHARD JOHNSON and THE SOVEREIGN NEWS COMPANY, 2075 East 65th Street, Cleveland, Ohio, did knowingly use and cause, counsel, induce, command, aid and abet each other in the use of a common carrier, to wit, the United States Parcel Service for carriage in interstate commerce from the Sovereign News Company, Cleveland, Ohio to the Webster Book Store, Fort Worth, Texas, an obscene, lewd, lascivious and filthy magazine entitled, Fucking Couples, Vol. 1 #1, all in violation of Sections 1462 and 2, Title 18, United States Code.

The Grand Jury further charges:

COUNT XXVI

On or about March 4, 1975, in Cleveland, Ohio, within the Northern District of Ohio, Defendants REUBEN STURMAN, MELVIN KAMINS, JOSEPH ZERNIC, ANTOINE DOSTAL, SAMUEL JOSEPH, RICHARD JOHNSON, and THE SOVEREIGN NEWS COMPANY, 2075 East 65th Street, Cleveland, Ohio, did knowingly use and cause, counsel, induce, command, aid and abet each other in the use of a common carrier, to wit, the United States Parcel Service for carriage in interstate commerce from the Sovereign News Company, Cleveland, Ohio to the Webster Book Store, Fort Worth, Texas, an obscene, lewd, lascivous and filthy magazine entitled, Sucking Sisters, Vol. 1 #1, all in violation of Sections 1462 and 2, Title 18, United States Code.

The Grand Jury further charges:

COUNT XXVII

On or about March 4, 1975, in Cleveland, Ohio, within the Northern District of Ohio, Defendants REUBEN STURMAN, MELVIN KAMINS, JOSEPH ZERNIC, ANTOINE DOSTAL, SAMUEL JOSEPH, RICHARD JOHNSON and THE SOVEREIGN NEWS COMPANY, 2075 East 65th Street, Cleveland, Ohio, did knowingly use and cause, counsel, induce, command, aid and abet each other in the use of a common carrier, to wit, the United States Parcel Service for carriage in interstate commerce from the Sovereign News Company, Cleveland, Ohio, to the Webster Book Store, Fort Worth, Texas, an obscene, lewd, lascivious and filthy magazine entitled, The Super Stars of Porno, all in violation of Sections 1462 and 2, Title 18, United States Code.

The Grand Jury further charges:

COUNT XXVIII

On or about March 4, 1975, in Cleveland, Ohio, within the Northern District of Ohio, Defendants REUBEN STURMAN, MELVIN KAMINS, JOSEPH ZERNIC, ANTOINE DOSTAL, SAMUEL JOSEPH, RICHARD JOHNSON and THE SOVEREIGN NEWS COMPANY, 2075 East 65th Street, Cleveland, Ohio, did knowingly transport in interstate commerce for the purpose of sale and distribution and cause, counsel, induce, aid and abet each other to knowingly transport in interstate commerce, for the purpose of sale and distribution, from Cleveland, Ohio to Fort Worth, Texas, two copies each of obscene, lewd, lascivious and filthy magazines, one entitled, Fun-Loving Nympho, another entitled, Oral Love, another entitled, Sex Tech, another entitled, Image, another entitled, Eze-Time, another entitled, Hot Cunts, another entitled, Sucking and Fucking, another entitled, Fucking Trios,

and another entitled, Sucking, all in violation of Sections 1465 and 2, Title 18, United States Code.

The Grand Jury further charges:

COUNT XXIX

On or about March 4, 1975, in Cleveland, Ohio, within the Northern District of Ohio, Defendants REUBEN STURMAN, MELVIN KAMINS, JOSEPH ZERNIC, ANTOINE DOSTAL, SAMUEL JOSEPH, RICHARD JOHNSON and THE SOVEREIGN NEWS COMPANY, 2075 East 65th Street, Cleveland, Ohio, did knowingly transport in interstate commerce for the purpose of sale and distribution and cause, counsel, induce, aid and abet each other to knowingly transport in interstate commerce, for the purpose of sale and distribution, from Cleveland, Ohio, to Fort Worth, Texas, one copy each of an obscene, lewd, lascivious and filthy magazine entitled, The Sex Family, another entitled, Rear Entry Vol. I,

another entitled, Positions and Techniques, another entitled, Nique, Book I, another entitled, Loving-Fucking, Vol. I #1, another entitled, Children of Love, Vol. I #1, another entitled, Sexual Arousal: Oral Sex, another entitled, The Super Stars of Porno, and another entitled, Foreplay, Vol. 3 #3, all in violation of Sections 1465 and 2, Title 18, United States Code.

This is a True Bill.

_____
FOREMAN

_____
FREDERICK M. COLEMAN
United States Attorney

_____
DOUGLAS P. ROLLER
Special Attorney
Criminal Division
U. S. Department of Justice

FIFTH AMENDMENT TO THE UNITED STATES CONSTITUTION

AMENDMENT V - Capital Crimes; Double Jeopardy; Self-Incrimination; Due Process; Just Compensation For Property

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

§2. Principals.

(a) Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal.

(b) Whoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal.

§371. Conspiracy to commit offense or to defraud United States.

If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any prupose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.

If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor.

§1461. Mailing obscene or crime-inciting matter.

Every obscene, lewd, lascivous, indecent, filthy or vile article, matter, thing, device or substance; and--

Every article or thing designed, adapted, or intended for preventing conception or producing abortion, or for any indecent or immoral use; and

Every article, instrument, substance, drug, medicine, or thing which is advertised or described in a manner calculated to lead another to use or apply it for preventing conception or producing abortion, or for any indecent or immoral purpose; and

Every written or printed card, letter, circular, book, pamphlet, advertisement, or notice of any kind giving information, directly or indirectly, where, or how, or

from whom, or by what means any of such mentioned matters, articles, or things may be obtained or made, or where or by whom any act or operation of any kind for the procuring or producing of abortion will be done or performed, or how or by what means conception may be prevented or abortion produced, whether sealed or unsealed; and

Every paper, writing, advertisement, or representation that any article, instrument, substance, drug, medicine, or thing may, or can, be used or applied for preventing conception or producing abortion, or for any indecent or immoral purpose; and

Every description calculated to induce or incite a person to so use or apply any such article, instrument, substance, drug, medicines, or thing--

Is declared to be nonmailable matter and shall not be conveyed in the mails

or delivered from any post office or by any letter carrier.

Whoever knowingly uses the mails for the mailing, carriage in the mails, or delivery of anything declared by this section to be nonmailable, or knowingly causes to be delivered by mail according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, or knowingly takes any such thing from the mails for the purpose of circulating or disposing thereof, or of aiding in the circulation or disposition thereof, shall be fined not more that $5,000 or imprisoned not more than five years, or both, for the first such offense, and shall be fined not more than $10,000 or imprisoned not more than ten years, or both, for each such offense thereafter.

The term "indecent", as used in this section includes matter of a character

tending to incite arson, murder, or assassination.

§1462. Importation or transportation of obscene matters.

Whoever brings into the United States, or any place subject to the jurisdiction thereof, or knowingly uses any express company or other common carrier, for carriage in interstate or foreign commerce--

(a) any obscene, lewd, lascivious, or filthy book, pamphlet, picture, motion-picture film, paper, letter, writing, print, or other matter of indecent character; or

(b) any obscene, lewd, lascivious, or filthy phonograph recording, electrical transcription, or other article or thing capable of producing sound; or

(c) any drug, medicine, article, or thing designed, adapted, or intended for preventing conception, or producing abortion, or for any indecent or immoral use; or any written or printed card, letter, circular, book, pamphlet, advertisement, or notice of any kind giving information, directly or indirectly, where, how, or of whom, or by what means any of such mentioned articles, matters, or things may be obtained or made; or

Whoever knowingly takes from such express company or other common carrier any matter or thing the carriage of which is herein made unlawful--

Shall be fined not more than $5,000 or imprisoned not more than five years, or both, for the first such offense and shall be fined not more than $10,000 or imprisoned not more than ten years, or both, for each such offense thereafter.

§1465. Transportation of obscene matters for sale or distribution.

Whoever knowingly transports in interstate or foreign commerce for the purpose of sale or distribution any obscene, lewd, lascivious, or filthy book, pamphlet, picture, film, paper, letter, writing, print, silhouette, drawing, figure, image, cast, phonograph recording, electrical transcription or other article capable of producing sound or any other matter of indecent or immoral character, shall be fined not more than $5,000 or imprisoned not more than five years, or both.

The transportation as aforesaid of two or more copies of any publication or two or more of any article of the character described above, or a combined total of five such publications and articles, shall create a presumption that such

publications or articles are intended for sale or distribution, but such presumption shall be rebuttable.

When any person is convicted of a violation of this Act, the court in its judgment of conviction may, in addition to the penalty prescribed, order the confiscation and disposal of such items described herein which were found in the possession or under the immediate control of such person at the time of his arrest.

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FILED
DEC 30 1982
ALEXANDER L. STEVAS,
CLERK

No. 82-732

In the Supreme Court of the United States

OCTOBER TERM, 1982

REUBEN STURMAN AND JOSEPH ZERNIC, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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Solicitor General

D. LOWELL JENSEN
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QUESTION PRESENTED

Whether the district court was required to hold an evidentiary hearing on petitioners' double jeopardy claim.

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BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A3-A21) is reported at 679 F. 2d 840. The opinion and order of the district court (Pet. App. A22-A26) are not reported.

JURISDICTION

The judgment of the court of appeals was entered on June 28, 1982. A petition for rehearing was denied on August 27, 1982. The petition for a writ of certiorari was filed on October 26, 1982. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

On October 16, 1980, a grand jury in the Southern District of Florida returned an eight-count indictment (Pet. App. A27-A40) alleging that petitioners had transported obscene materials into the district by common carrier, in violation of 18 U.S.C. 1462 and 1465 (Counts 2-7), and that

petitioners had conspired to commit those offenses, in violation of 18 U.S.C. 371 (Count 1).[1] Prior to trial, petitioners moved to dismiss the conspiracy count on double jeopardy grounds.[2] The district court denied the motion (Pet. App. A22-A26), and the court of appeals affirmed (Pet. App. A3-A21).

1. On March 15, 1976, a grand jury in the Northern District of Ohio returned a 29-count indictment charging petitioners and six co-defendants, including the Sovereign News Company and Melvin Kamins, with violations of federal obscenity laws and conspiracy (Pet. App. A153-A190). That indictment alleged, inter alia, that petitioners and their co-defendants had used the mails and common carriers to effect the movement of obscene materials from Cleveland, Ohio, to Fort Worth, Texas, in violation of 18 U.S.C. 1461 and 1465, and that they had conspired from September 1973 through March 15, 1976, to profit financially by the interstate shipment of obscene materials. At trial the government showed that the obscene materials had been shipped to other parts of the country in addition to Texas—including Pittsburgh, Pennsylvania (*id.* at A7). The evidence also showed that, in connection with petitioners' management of Sovereign News, petitioner Sturman and co-defendant Kamins also directed the business of a

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[1]The October 16 indictment was a superseding indictment. Petitioners were originally indicted along with 43 co-defendants for violations of the obscenity laws and conspiracy (Pet. App. A41-A122). The original conspiracy count alleged that the conspiracy existed from July 1, 1977, to the date of that indictment, February 11, 1980. The superseding indictment alleged that the conspiracy existed from December 1, 1977, to and including February 1980. In the superseding indictment, petitioners were charged along with two other named defendants, Al Bloom and Steve Ast[illegible]l.

[2]Petitioners did not challenge their prosecution on the substantive counts.

number of satellite bookstores throughout the United States; one of these stores was Majestic News of Pittsburgh. No evidence of any Florida transaction or operation was introduced at trial. The jury acquitted petitioners and their co-defendants on the conspiracy count. See generally *United States* v. *Kamins*, 479 F. Supp. 1374, 1386-1388 (W.D. Pa. 1979).

In November 1978, a grand jury in the Western District of Pennsylvania returned a 16-count indictment charging petitioner Sturman and five other co-defendants with 15 counts of transportation of obscene films in interstate commerce, in violation of 18 U.S.C. 1465, and with conspiracy to violate the obscenity laws, in violation of 18 U.S.C. 371 (Pet. App. A123-A152). The conspiracy count alleged that between January 1, 1974, and July 18, 1977, petitioner Sturman, co-defendant Kamins, and the other four named defendants conspired to transport obscene materials in interstate commerce for profit, and that Sovereign News Company in Ohio and Majestic News Company in Pittsburgh were instrumental in the distribution of obscene materials in Pennsylvania, West Virginia, Ohio, and New York. Prior to trial, Kamins and petitioner Sturman moved to dismiss the conspiracy count on double jeopardy grounds, claiming that the indictment charged the same conspiracy already prosecuted in Ohio. The district court agreed and granted the motion. *United States* v. *Kamins, supra*; see Pet. App. A7-A8.[3]

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[3]In dismissing the conspiracy count, the district court observed (479 F. Supp. at 1390-1391):

> We do not agree with the statement of defense counsel at oral argument that the government, once having prosecuted this business enterprise, is *forever* precluded from again charging that it harbored a conspiracy to violate the obscenity laws. The double jeopardy question would have to be faced separately at each

2. The instant indictment's conspiracy count alleged that between December 1, 1977, and February 1980, petitioners, their co-defendants, and others conspired to transport into the Southern District of Florida nine motion pictures for sale and distribution. The indictment enumerated five overt acts in furtherance of the conspiracy; these involved arrangements with FBI undercover agents between December 6, 1977, and January 5, 1980, to ship obscene films to Miami.

Relying upon their acquittals on the Ohio indictment, petitioners moved to dismiss the conspiracy count on double jeopardy grounds. The motions were denied following a review of the transcript of the Ohio trial. In reaching its decision, the district court found that the instant indictment dealt with "an entirely different set of facts and a completely distinct time frame" (Pet. App. A25) from the earlier indictments and that the instant indictment was aimed at reaching "only a specific limited conspiracy to ship obscene material to Miami, Florida" (*id.* at A25-A26).

3. On interlocutory appeal, petitioners claimed that the district court erred in not holding an evidentiary hearing on their motions and in not dismissing the conspiracy count. The court of appeals rejected petitioners' arguments. It stated that "[a]bsent a proffer of evidence demonstrating a nonfrivolous double jeopardy claim there is no obligation to hold an evidentiary hearing * * *" (Pet. App. A18); it

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prosecution, and the passage of time or changes in other elements might be crucial.

Our decision is limited to a comparison of the current indictment with the Cleveland indictment and trial and the inescapable conclusion that the agreement alleged and established at the prior trial was broad enough to encompass the agreement alleged here. While the issues raised in the two conspiracy counts are not identical or congruent, they are sufficiently similar and overlapping to raise the double jeopardy bar to reprosecution.

then held that petitioners had not made the requisite showing of a prima facie claim (*id.* at A17-A18). The court also noted that petitioners had not suggested how an evidentiary hearing could have served any purpose given the extensive record already before the court (*id.* at A17). In addition, the court held that because the two indictments alleged conspiratorial events in separate places, during separate time periods, with different co-conspirators and different proof (since no evidence was introduced at the Ohio trial that even suggested a connection with Miami), prosecution for the two separate conspiracies was not barred by the Double Jeopardy Clause (Pet. App. A3-A17). Judge Hatchett dissented on the ground that the district court should have held an evidentiary hearing (*id.* at A18-A21).

ARGUMENT

Petitioners contend (Pet. 14-26) that the district court erred in denying their double jeopardy claim without an evidentiary hearing. This contention was correctly rejected by the court of appeals and does not merit review by this Court.

The record clearly showed that the Miami transactions that are the subject of this indictment were not a part of the Ohio conspiracy. The district court had before it the complete transcript of the Ohio trial and a record of all other arguably relevant proceedings (Pet. App. A17). These records established that the Ohio prosecution embraced a far-reaching conspiracy, which ended in March 1976, to transmit obscene materials to numerous destinations throughout the country. By contrast, the present indictment alleges an agreement beginning nearly two years later—in December 1977—and limited to the objective of transporting nine obscene films to Miami, a place not mentioned in either the indictment or trial of the earlier case. Moreover, of the seven persons named in the Ohio indictment, only petitioners were named in the Florida indictment; by the

same token, petitioners' co-conspirators named in the Florida indictment were not named in the Ohio indictment. Given these dissimilarities demonstrated by the record with respect to the time, place, and actors in the alleged conspiracies, the district court acted correctly in ruling on the basis of the relevant record materials without resort to an evidentiary hearing. As the court of appeals accurately observed (Pet. App. A17), in these circumstances "it is difficult to imagine what other relevant evidence could have been adduced at an evidentiary hearing," and petitioners do not suggest here what evidence could possibly have been adduced at such a hearing to support their claim.

Petitioners' contention, therefore, is simply that a district court must *always* hold an evidentiary hearing when a double jeopardy claim is raised. No authority supports this proposition. On the contrary, the courts are in agreement that the burden shifts to the government to establish that a prosecution is not barred by the Double Jeopardy Clause only when a defendant has made a preliminary showing that his claim is not frivolous, and no court has held that a hearing must be conducted when the defendant has failed to meet this threshold requirement. See *United States* v. *Bendis*, 681 F. 2d 561 (9th Cir. 1982); *United States* v. *Booth*, 673 F. 2d 27 (1st Cir.), cert. denied, 456 U.S. 978 (1982); *United States* v. *Jabara*, 644 F. 2d 574 (6th Cir. 1981); *United States* v. *Stricklin*, 591 F. 2d 1112 (5th Cir.), cert. denied, 444 U.S. 963 (1979); *United States* v. *Inmon*, 568 F. 2d 326 (3d Cir. 1977); *United States* v. *Mallah*, 503 F. 2d 971 (2d Cir. 1974), cert. denied, 420 U.S. 995 (1975).

Petitioners' contention (Pet. 16-22) that there exists a conflict in the circuits based on their assertion that some courts have recognized that an evidentiary hearing must always be held, even if there is no showing that the claim is not frivolous, is without foundation. In *United States* v.

Inmon, supra, the court found at the outset that the defendant's motion presented a "prima facie non-frivolous claim." 568 F. 2d at 329. Moreover, the court found that an evidentiary hearing was required because, given that the defendant had pleaded guilty to the charges in the first indictment, there were insufficient facts in the record from which to determine whether the two indictments overlapped. *Id.* at 329-330. Here, by contrast, petitioners had a complete trial on their first indictment, and the district court had before it the trial transcript and the record of other relevant proceedings, which provided a more than sufficient basis for its ruling. The other cases relied on by petitioner are inapposite. In neither *United States* v. *Jabara, supra*, nor *United States* v. *Stricklin, supra*, did the court of appeals remand for a hearing. Indeed, in *Jabara* the court affirmed the denial of the defendant's motion to dismiss certain counts on double jeopardy grounds (644 F. 2d at 578), even though it appears that no evidentiary hearing had been held (*id.* at 576-577).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

REX E. LEE
Solicitor General

D. LOWELL JENSEN
Assistant Attorney

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